91-1484

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES H. POU BAILEY, *et al.*,
Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of North Carolina's application of N.C. Gen. Stat. § 105-267 to defeat Petitioners' claims for income tax refunds denies Petitioner taxpayers meaningful redress for federal constitutional claims that a tax has been unlawfully imposed and collected, thereby violating the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as protected by 42 U.S.C. Section 1983?

2. Whether the Supreme Court of North Carolina may require Petitioners to exhaust the administrative remedy provided for in N.C. Gen. Stat. § 105-267 as a precondition for asserting claims for relief under the United States Constitution as protected by 42 U.S.C. § 1983?

3. Whether the Mandate of the Supreme Court of North Carolina that claims for relief under the United States Constitution, as protected by 42 U.S.C. § 1983, be dismissed when said claims were not before the Court and Petitioners were given no notice or opportunity to be heard thereon, violates Petitioners' rights to access to the Courts as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners are 251 state and local government officials and employees who are either retired or vested members of various state-administered retirement systems or are the beneficiaries, survivors, etc., of such officials and employees, who have paid state income tax on their retirement benefits since 1989. The action is brought by the named Petitioners on behalf of themselves and all others similarly situated. Respondents are the State of North Carolina, the North Carolina Department of Revenue, the Secretary of the North Carolina Department of Revenue, the North Carolina Department of State Treasurer, Helen A. Powers, former Secretary of the North Carolina Department of Revenue, Harlan E. Boyles, (in their individual and official capacities), Treasurer of the State of North Carolina, and Betsy Justus, the current Secretary of the North Carolina Department of Revenue and various state-administered retirement systems. (A full list of named Petitioners and Respondents appears at Appendix K.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James H. Pou Bailey, a retired North Carolina Superior Court judge, and 250 other named state pensioners or employees who were Plaintiffs and Petitioners below, on their own behalf of all others similarly situated as class certified by the trial court, hereby petition this Court for a Writ of Certiorari to the Supreme Court of North Carolina.

OPINIONS BELOW

The Opinion of the Supreme Court of North Carolina is reported at 330 N.C. 227, 410 S.E.2d 462 (1991). App. A at 1a-26a. The decision of the trial court, General Court of Justice, Superior Court Division, Wake County, North Carolina, is unpublished. App. C at 29a-31a.

JURISDICTION

The Supreme Court of North Carolina issued its Opinion on 6 December 1991. This Petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a) in that North Carolina's application of N.C. Gen. Stat. § 105-267 to defeat Petitioners' claims for income tax refunds to the Petitioner class is repugnant to rights guaranteed by the United States Constitution and 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 10 of the United States Constitution provides in relevant part

> "No State shall . . . pass any . . . law impairing the obligations of contracts . . ."

The fifth amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due proces of law; nor shall private property be taken for public use without just compensation."

The fourteenth amendment to the United States Constitution provides in relevant part:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

N.C. Gen. Stat. § 105-266.1 provides in relevant part:

Refunds of overpayment of taxes.

(a) Any taxpayer may apply to the Secretary of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later.

(b) . . .

(c) Within 90 days after notification of the Secretary's decision with respect to a demand for refund of any tax or additional tax under this section any taxpayer aggrieved thereby, in lieu of petitioning for administrative review by the Tax Review Board under G.S. 105-241.1, may bring a civil action against the Secretary of Revenue for recovery of the alleged overpayment in the Superior Court of Wake County, . . . If upon trial it shall be determined that there has been any overpayment of tax or additional tax, judgment shall be rendered therefor, with interest, and the same shall be refunded by the State.

N.C. Gen. Stat. § 105-267 provides in relevant part:

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such pay-

> ment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought . . . within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; . . ..

N.C. Gen. Stat. § 147-84 provides:

> Whenever taxes or other receipts of any kind are or have been made by clerical error, misinterpretation of the law, or otherwise, collected and paid in the State treasury in excess of the amount found legally due the State, said excess amount shall be refunded to the person entitled thereto.

1989 N.C. Session Laws, Chapter 792 provides in relevant part:

> AN ACT TO PROVIDE INCOME TAX EXEMPTIONS FOR ALL RETIREES AND TO INCREASE STATE AND LOCAL RETIREMENT BENEFITS.
>
> *The General Assembly of North Carolina enacts:*
>
> Section 1.1. G.S. 105-134(b), as enacted by Chapter 728 of the 1989 Session Laws, is amended by adding a new subdivision to read:
>
> "*(6) a An amount, not to exceed four thousand dollars ($4,000), equal to the sum of the amount calculated in subparagraph b, plus the amount calculated in subparagraph c.*

b The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.

c The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than the state, local, or federal government retirement plans, not to exceed a total of two thousand dollars, ($2,000) in any taxable year.

STATEMENT OF THE CASE

Prior to 12 August 1989 and since 1941, with regard to the Teachers and State Employees Retirement System, all benefits, pensions or monies paid or to be paid by Respondent retirement plans or systems to Petitioner class members, participants, retirees or their beneficiaries and the rights thereto were specifically exempt from North Carolina income tax. These statutory income tax exemptions were in effect for both voluntary and mandatory plans and systems.

On 12 August 1989 the General Assembly ratified 1989 Sess. Laws. ch. 792 (hereafter the "Act") which purportedly repealed the existing statutory exemptions from income taxes on benefits, pensions or monies of Petitioners retroactively to 1 January 1989 (a $4,000.00 statutory exemption was enacted). On 26 February 1990, Summons was issued and Complaint was filed in the instant action and on 27 February 1990, conditional class certification was granted for the sole purpose of allowing the representatives of the class (on behalf of all class members) to make demands for refunds. Demands for refunds were made on behalf of the class to the Secretary and Department of Revenue on 28 February 1990, 26 March 1990, 16 April 1990, and 26 April 1990. App. F at 76a-83a. Demands were denied by letter of 26 April 1990. App. G at 84a-85a.

The denial letter stated that because the demands did not identify individual taxpayers by name and social security numbers, did not state the year the taxes were paid, and did not furnish sufficient information to determine the amount of tax which any taxpayer paid, the demands made were not valid and no refunds would be issued. None of these requirements are mandated by N.C. Gen. Stat. § 105-267 and in each demand letter sent, Petitioners referenced the lawsuit and pointed out that records reflecting each class member's name and social security number were in the possession of Defendants as all Petitioners are present or former state employees or retirees receiving a pension from a state administered plan or retirement system.

Additionally, some Petitioners and other class members made individual demands for refund within 30 days of payment of their 1989 income taxes in which their social security numbers and other relevant information were provided to the Secretary and the Department of Revenue. App. D at 48a, ¶ 80 and App. E at 70a, ¶ 80. No response to the individual demands was made by the Secretary of Revenue.

Subsequently, by letters dated 16 and 26 April 1990, class demands were made upon Respondent Boyles, Treasurer of the State of North Carolina, pursuant to N.C. Gen. Stat. § 147-84 for a refund of all income taxes paid on class members' retirement benefits, pensions or monies. App. H at 86a-89a. N.C. Gen. Stat. § 147-84 does not specify any statute of limitations. These demands were denied on 11 June 1990 by letter from an Assistant Attorney General on the basis that the State Treasurer did not have the authority to determine whether refunds were due to Petitioners. App. I at 90a-91a.

In their Complaint, Petitioners challenged the repeal of the income tax exemptions on various constitutional, statutory and common law grounds, including that such repeal: (1) constitutes a breach of contract between Petioners and their governmental employers or pension

plans; (2) violates the due process and equal protection clauses of the fourteenth amendment, violates the fifth amendment prohibition against taking property without just compensation and violates article I, section 10 of the U.S. Constitution by impairing the obligation of contract, all as protected by 42 U.S.C. § 1983; and (3) violates various provisions of the North Carolina Constitution. App. A at 7a, n. 1. Petitioners were later allowed to amend their Complaint and Petition and alleged that Respondents' use of N.C. Gen. Stat. § 105-267 to deny Petitioners' demands for refund violated article I, section 10 of the United States Constitution and Petitioners' fifth and fourteenth amendment due process and equal protection rights as protected by 42 U.S.C. § 1983. App. D at 48a, 49a and 51a. ¶¶ 82, 86 and 93. Petitioners' Amended Complaint was filed some seven months after making their initial demand.

Petitioners sought return of all monies illegally collected as income tax on their benefits, pensions or monies. In addition, Petitioners sought: (1) a declaration that the effect of the Act repealing the income tax exemptions is unlawful and unconstitutional, and therefore void and unenforceable; and (2) a permanent injunction prohibiting Respondents from collecting income tax on any of their future benefits, pensions or monies to be paid by Respondent plans or systems.

On 29 October 1990, after filing the Amended Complaint, the Superior Court granted Petitioners' Motion for Class Certification, the class being defined to include all State and local government retirees and officials and employees whose benefits had vested in any of Respondent plans or systems prior to 12 August 1989. Petitioners' Motion for Partial Summary Judgment was subsequently granted on the grounds that imposition of the income tax was a retrospective tax on "acts previously done" in violation of article I, section 16 of the North Carolina Constitution and that, as to judges, the tax diminished their salaries in violation of article IV, section 21 of the North Carolina Constitution. App. C at 30a-31a. The trial court

then ordered refunds of those monies theretofore collected as taxes on Petitioners' pensions and benefits and enjoined further collection of said taxes. The court denied Petitioners' Motion for Partial Summary Judgment for alleged diversion of retirement funds in violation of article V, section 6(2) of the North Carolina Constitution. No hearing or determination by the trial court was made on Petitioners' claims for relief under the United States Constitution as protected by 42 U.S.C. § 1983.

On 31 December 1990, a stay of the injunction portions of the Partial Summary Judgment was entered without objection by Petitioners on certain agreed grounds. Thereafter, on 31 December 1990, the trial court granted both Respondents Boyles' and Powers' Motions for Summary Judgment as to all claims against them in their individual capacities. Petitioners appealed from the Orders granting Respondents Powers' and Boyles' Motion for Summary Judgment as to claims against them in their individual capacities which appeal was later voluntarily dismissed. Respondents appealed from the trial court's Order Granting Partial Summary Judgment to Petitioners.

This case came before the Supreme Court of North Carolina after it granted the parties' joint Petition for Discretionary Review Prior to Determination by the North Carolina Court of Appeals. That Court issued its opinion on 6 December 1991 in which it reversed the trial court's grant of partial summary judgment for Petitioners and remanded the action to the trial court with instructions to enter summary judgment for Respondents on all of Petitioners' claims. App. A at 24a. The Supreme Court of North Carolina ordered dismissal of all claims despite the fact that neither the trial court nor the parties had yet addressed Petitioners' federal constitutional claims and certain of Petitioners' state law claims which were not included within the appeal. Thus, the Supreme Court of North Carolina had no jurisdiction over these claims.

The Supreme Court of North Carolina based its decision on the application of N.C. Gen. Stat. § 105-267 (1989). This statute prohibits injunctions against the collection of taxes and provides an administrative procedure for the refund of taxes unconstitutionally collected. The statute does not provide for challenge of the collection of an unconstitutional tax prior to payment. The State Supreme Court held that by failing to show that each Petitioner individually demanded a refund *prior* to filing Complaint, the Petitioner class had failed to meet the "condition precedent" to the grant of refunds and, therefore, Respondents were entitled to summary judgment on all of Petitioners' state and federal claims. No hearing or opportunity to be heard was afforded at either the trial or State Supreme Court levels on any of Petitioners' federal constitutional claims.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF NORTH CAROLINA'S APPLICATION OF GEN. STAT. § 105-267 TO DEFEAT PETITIONERS' CLAIMS FOR INCOME TAX REFUNDS DENIES PETITIONER TAXPAYERS MEANINGFUL REDRESS FOR FEDERAL CONSTITUTIONAL CLAIMS THAT A TAX HAS BEEN UNLAWFULLY IMPOSED AND COLLECTED, THEREBY VIOLATING THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS PROTECTED BY 42 U.S.C. § 1983.

In its opinion below, the Supreme Court of North Carolina held that N.C. Gen. Stat. § 105-267 provides the only method for North Carolina taxpayers to challenge the constitutionality of an illegal tax. App. A at 10a. N.C. Gen. Stat. § 105-267 provides that any taxpayer who wishes to challenge the constitutionality of a tax must pay the tax and within 30 days of payment, demand a refund from the North Carolina Department of Revenue. If the demand for refund is denied or if no response is

made to the demand for refund, the taxpayer may file suit to recover a refund after 90 days from the refund demand but within three years after expiration of the 90-day period. N.C. Gen. Stat. § 105-267 (1989). Section 105-267 also prohibits the issuance of any injunctions against the collection of income taxes from individual taxpayers. *Id.* By contrast, a taxpayer demanding a refund for taxes paid due to clerical error or mistake has three years within which to demand a refund. N.C. Gen. Stat. § 105-266.1 (1989).

The trial court held that Respondents' collection of the taxes at issue was in contravention of the North Carolina Constitution. App. C at 30a-31a. The Supreme Court of North Carolina did not reach these issues but held that the procedural technicalities of § 105-267 had not been met by Petitioners, and thus, all state constitutional claims and all federal constitutional claims must be dismissed. App. A at 24a.

This Court has held that where a state does not provide for meaningful predeprivation due process guarantees such as allowing an injunction against the collection of invalid or unconstitutional taxes, the State must provide "a clear and certain remedy" for any erroneous or unlawful tax collection. *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 2251 (1990) (citations omitted). Regardless of the source of the property right of Petitioners, be it state law or federal law, North Carolina may not provide an illusory remedy for unconstitutional deprivation of that right. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Although this Court held in *McKesson* that a state may protect its "exceedingly strong interest in financial stability" by not providing a predeprivation forum for challenging the legality of a tax, the State must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligations, but also a "clear and certain remedy . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax

is a meaningful one." *McKesson* at ——, 110 S. Ct. at 2251. (Citations omitted).

Various federal and state courts have commented on the inadequacy of North Carolina's statutory tax refund scheme. For example, the United States District Court for North Carolina held in 1931 that the precursor to N.C. Gen. Stat. § 105-267 did not provide an adequate remedy for a number of taxpayers seeking to maintain a class action challenging the legality of a tax. *Gramling v. Maxwell*, 52 F.2d 256, 260 (D.C.N.C. 1931). Recently, the North Carolina Court of Appeals recognized that N.C. Gen. Stat. § 105-267 may not satisfy federal due process principles as enumerated in *McKesson Corp. v. Dept. of Business Regulation of Florida. 47th Street Photo Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990) *app. dism., rev. denied*; 329 N.C. 268, 407 S.E.2d 835 (1991). Finally, the United States District Court for the Eastern District of North Carolina recently stated that the remedy provided by N.C. Gen. State. § 105-267 is not plain, speedy and efficient but is so uncertain that it is impossible for taxpayers to enforce their federal rights in the courts of North Carolina. *Swanson v. Powers*, 89-282-CIV-5-H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992). App. J at 99a.

This Court has recognized that a postdeprivation remedy may be contingent upon the taxpayer filing claim within the time prescribed by a valid local limitation. *Ward v. County Board of Commissioners*, 253 U.S. 17, 25 (1920). However, in the instant action, the Supreme Court of North Carolina did not hold that Petitioners had failed to timely demand a refund, but held that their failure to forebear filing complaint until after demand for refund was made barred Petitioners' recovery on all state law and federal constitutional claims.

This hypertechnical reading of N.C. Gen. Stat. § 105-267 deprives Petitioners not only of a meaningful pre-

deprivation opportunity to be heard regarding the collection of unconstitutional taxes, but effectively denies any opportunity to challenge an unconstitutional tax. As a preliminary matter, the State has no way of administering the procedure set forth in the statute. The United States District Court in *Swanson v. Powers* stated:

> A further complication is that the Defendants cannot administer the 30-day rule. The Defendants do not date-stamp returns filed prior to the deadline. Defendants assumed that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those Plaintiffs filing their returns more than 30 after signing the returns never had the opportunity to file a claim.

App. J at 97a.

In addition, the letter sent to counsel for Petitioners denying the Class demand for refund under N.C. Gen. Stat. § 105-267 set forth several requirements that the Secretary of Revenue found lacking in Petitioners' demand letters. Specifically, Ms. Powers asserted that without having the names, social security numbers and the amount of taxes paid by each of the Petitioner class members, she could not determine the validity of Petitioners' refund demand. The Supreme Court of North Carolina recognized that the statute did not require such particularity in a refund demand, but held that Secretary Powers' denial was reasonable because administrative agencies of the State may impose reasonable regulations for the administration of their respective departments. App. A at 14a. The State Supreme Court acknowledged that class actions may be appropriate in taxpayer refund suits, but would require each class member to make an individual demand for refund prior to filing complaint and prior to obtaining class certification. In a situation such as this where each individual class member's refund may be relatively small, N.C. Gen. Stat § 105-267 provides an illusory remedy if taxpayers may not share

the cost of litigation by way of a class action. *Gramling*, 52 F.2d at 261.

Finally, to require that individual taxpayers assess the constitutionality of taxes collected from them, make the determination of whether or not to sue, and to secure counsel to prosecute such a suit, a 30-day statute of limitations for demanding a refund is not reasonable and does not provide a clear, certain remedy. *See e.g.*, *McKesson* at ——, 110 S.Ct. at 2254, n.28 where this Court implicitly approved a three-year statute of limitations imposed by the State of Florida to challenge the constitutionality of a tax paid under protest; and *Swanson v. Powers*, App. J at 97a, where the Court held that the application of the 30-day statute of limitations in N.C. Gen. Stat. § 105-267 deprived Plaitiff taxpayers of a full hearing and judicial determination of their claims. Thus, North Carolina's application of N.C. Gen. Stat. § 105-267 to Petitioners has deprived them of a clear and certain remedy for redress of their federal constitutional rights. Certiorari should be granted to remedy this clear violation of Petitioners' rights.

II. THE SUPREME COURT OF NORTH CAROLINA MAY NOT REQUIRE PETITIONERS TO EXHAUST ADMINISTRATIVE REMEDIES PROVIDED FOR IN N.C. GEN. STAT. § 105-267 AS A PRECONDITION FOR ASSERTING CLAIMS FOR RELIEF UNDER THE UNITED STATES CONSTITUTION AS PROTECTED BY 42 U.S.C. § 1983.

Petitioners, by way of their amended supplemental petition and complaint raised several federal constitutional claims for relief pursuant to 42 U.S.C. § 1983. App. D at 48a, 49a and 51a. The trial court ruled on only three of Petitioners' state constitutional claims but did not reach or consider, nor did the parties raise on Petitioner's Motion for partial summary judgment, any of the federal constitutional claims. App. C at 29a-31a. Nevertheless, the Supreme Court of North Carolina ordered on re-

mand that the trial court dismiss all claims as the supreme court's application of N.C. Gen. Stat. § 105-267 mandated entry of summary judgment for Respondents on all of Petitioners' claims, including the federal constitutional claims. App. A at 24a.

The court below held that because Petitioners failed to exhaust the administrative remedy provided for in N.C. Gen. Stat. § 105-267, Petitioners' federal constitutional claims brought pursuant to 42 U.S.C. § 1983 must be dismissed. This application of N.C. Gen. Stat. § 105-267 is in direct contravention of the decision of this Court in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302 (1988). In *Felder*, this Court held that a state administrative remedy statute requiring notice of suit prior to the filing of a complaint against a state agency did not need to be complied with prior to asserting section 1983 claims. 487 U.S. at 140. The court below plainly erred in requiring Petitioners to exhaust administrative remedies as a condition precedent to asserting their Section § 1983 claims. A Writ of Certiorari should be granted if only to correct this plain misapplication of this Court's mandate in *Felder v. Casey*.

III. THE SUPREME COURT OF NORTH CAROLINA DENIED PETITIONERS' DUE PROCESS RIGHTS TO MEANINGFUL ACCESS TO THE COURTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

By remanding this case to the trial court with instructions to dismiss all claims, including Petitioner's federal constitutional claims brought pursuant to 42 U.S.C. § 1983, the Supreme Court of North Carolina denied Petioners any access to the courts of North Carolina. This a state may not do and clearly violated Petitioners' due process guarantee to have access to the courts of the land for redress of federal constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Certiorari should

be granted to correct this plain abrogation of Petitioners' constitutional right to have federal constitutional claims decided in courts of the states in which they reside.

CONCLUSION

The Supreme Court of North Carolina has plainly abrogated rights guaranteed to Petitioners by the United States Constitution by its application of N.C. Gen. Stat. § 105-267 to deny Petitioners any redress for the unconstitutional imposition and collection of taxes by the state. In doing so, the North Carolina court blatantly and cavalierly disregarded the prior decisions of this Court holding that states must: 1) afford meaningful backward-looking relief to taxpayers for the unconstitutional collection of taxes; 2) entertain claims brought pursuant to 42 U.S.C. § 1983 despite the plaintiff's failure to exhaust state imposed administrative remedies; and 3) allow access to state courts to those asserting federal constitutional claims. This Court should, therefore, grant a Writ of Certiorari to the Supreme Court of North Carolina to protect Petitioners' constitutional rights.

Respectfully submitted,

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March 4, 1992

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 105PA91—Wake

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, MELVIN T. MUNN, FRED BENSON, JAMES H. KLEU, JOSEPH GILMER BINKLEY, EULA G. BULLARD, MILDRED C. SEAWELL, EMILY B. JONES, SAMUEL T. ARRINGTON, JOHN W. CARTWRIGHT, DAVID L. BRITT, MATTIE. E. LASSITER, PAUL LEE SALISBURY, JR., CHARLES S. MANOOCH, JR., ROY E. THOMPSON, and CLYDE R. SHOOK, JOHN H. ALLEN, JESSE M. ALMON, EDWIN C. GUY, GEORGE SMITH, ERNEST P. CAIN, THOMAS DALE JOHNSON, BILLY A. BAKER, and ROSALIE T. ADAMS, VICTOR ALDRIDGE, SR., CLIFTON A. ANDERSON, HELEN L. ANDREWS, CHARLES E. ARRINGTON, LILLIAN B. ARRINGTON, WILLIAM K. AUBRY, JR., W. PRESTON BARBER, JR., PARKER N. BARE, MARGARET H. BARKLEY, JACKIE D. BARRETT, JAMES B. BARRETT, ARTHUR C. BEAMON, FRANK M. BENDER, WILLIAM D. BERG, THOMAS W. BERRIER, PAULINE J. BLACKBURN, BRENDA W. BLANCHFIELD, ROBERT L. BLEVINS, ELIZABETH F. BOLICH, JUNIOUS L. BOST, ELLIE L. BOYLES, HENRY L. BRIDGES, LAWRENCE R. BRIDGES, CAREY H. BROADWELL, CHANCEL T. BROWN, JOAN W. BROWN, MARGARET M. BROWN, JOHN W. BUCHAN, EUNICE W. BULLARD, DEWEY L. BUTLER, MCCAULEY C. BYRUM, GERTRUDE G. CAHOON, JOSEPH H. CALDER, CATHERINE N. CANN, DOROTHY T. CARMICHAEL, MAURICE O. CATON, ROBERT A. CAUDLE, MARGARET H. CHAPMAN, ODELL CHILDRESS, CARL L. CLARKE, EDWARD L. CLAY, SR., SHARI T. CLINE, SELMA C. CLODFELTER, HAROLD D. COLEY, MATALINE COLLETTE, ROBERTA M. COOK, ANNA L. COOPER, BERTIE R. COOPER, CHARLIE C.

COOPER, CARLYLE C. CRAVEN, N. CHRISTEL C. CREWS, DONALD E. CURTIS, VIOLET H. DANIEL, MILDRED K. DAVIS, HOWARD DICKEY, JOHN B. DILLARD, ESTHER P. DUNCAN, T. J. DUNCAN, HELEN M. DUPREE, JOSEPH E. DUPREE, JESSE W. EDWARDS, CHARLES B. ELKS, DAN R. EMORY, CHARLES F. ENGLISH, MARTIN W. ERICSON, JAMES M. EUBANKS, JR., RUTH U. FARTHING, NELLIE D. FOUNTAIN, J. WARREN FRANKLIN, ZENNA H. FRANKLIN, EMMA LEE FURCHES, ALFRED H. GARNER, EVELYN C. GARRISON, FRED W. GENTRY, CATHERINE M. GILBERT, MEREDITH H. GILBERT, IVEY B. GORDON, IZORIA S. GORDON, LOUIS N. GOSSELIN, GLADYS P. GREEN, CONSUELLA GREENWOOD, JOHN L. HAIRSTON, RUTH A. HAIRSTON, JAMES A. HAMMONS, SAMUEL L. HARMON, MARY J. HAUSER, ELMO F. HICKS, IDALIA O. HIGH, CARLEE F. HODGE, LUCY GREENE HUBBARD, HUGHES J. HUNT, KAY C. HURT, HAROLD D. ISENBERG, BEN M. ISENHOUR, MARY G. ISENHOUR, MARY P.H. JACKSON, LILLIAN K. JOHNSON, VIRGINIA P. JOHNSON, WALTER C. JOHNSON, JR., C. MYLES JONES, JOE E. JONES, JUNE R. JONES, ROBERT P. JONES, WALTER C. JOYCE, SR., ODELL M. KEARNEY, RUTH H. KESSLER, JOHN KIGER, VELMA D. KING, FRANCES S. KISER, JACOB KOOMEN, JR., DAVID T. LAMBERT, WALTON S. LATTA, TRUDIE J. LAWSON, CLARENCE T. LEINBACH, JR., WALTER G. LEMING, VIRGINIA P. LEWIS, YATES W. LOWE, JAMES A. LYERLY, HARRIETTE B. MCCORMICK, L. JAMES MCDANIEL, E. R. MCKAY, HARRY B. MCKEE, W.S. MCKINNEY, DORIS W. MCLAMB, JOSEPH T. MCMILLIAN, JAMES F. MALCOLM, EDWARD G. MANNING, JAMES H. MARCH, ELZA VAN MARION, MARY H. MARTIN, LESTER G. MASENCUP, HELEN S. MAST, JAMES B. MAST, JR., MELVILLE L. MAUNEY, ROBERT A. MAYER, VIRGINIA H. MICKEY, NONA S. MILLER, RUTH MINICK, GROVER F. MINOR, CHARLES B. MIRACLE, JACK K. MOORE, LOLA T. MORETZ, LEO G. MORGAN, WILLIAM F. MORGAN, BRADY W. MULLINAX, SR., JOHN I. NICHOLS, LUCINDA L. NOWLIN, DONALD S. OVERCASH, DWIGHT

W. PADGETT, CALVIN C. PEARCE, WILLIAM W. PEEK, GEORGE W. PEELER, MICHAEL PELECH, JUANITA B. PENN, DIANE S. PEOPLES, CHARLES B. PIERCE, EVELYN D. PIERCE, SYLVIA S. PINYAN, MILDRED R. POINDEXTER, WINNIE D. POTTS, LEVI GLEN POWELL, THOMAS C. PRATT, CHARLES W. RANKIN, RALPH L. RAY, PATSY M. REYNOLDS, MATTIE B. RICHARD, ELNA C. ROSE, FRANCES T. SACRINTY, EDNA G. SCALES, MELVIN J. SCALES, VALDA E. SCHMITT, WORTH G. SEATS, CHARLES SELLE, NELSON L. SHEAROUSE, CONRAD H. SHELTON, MARY L. SHELTON, ELIZABETH H. SHERMER, BLANCHE S. SHIPP, RALPH N. SHUE, FRANCIS C. SIMMONS, JOE L. SIMMONS, HAROLD E. SIMPSON, RICHARD H. SIMPSON, REUBEN E. SLADE, GARNET N. SMART, LENORA S. SMITH, LONNIE H. SMITH, MATTIE S. SMITH, PAUL M. SMITH, FRANCES J. SNOW, EULALIA T. SOLOMON, G. VANCE SOLOMON, LUCILE J. SPEAS, DAVID W. SPIVEY, CHARLES A. SPEED, CAROLINE G. SPENCER, THOMAS S. THOMPSON, ELLA BELLE TILLMAN, DORIS E. TUCKER, JUSTUS M. TUCKER, RUTH L. TUCKER, MARGARET M. TUGMAN, FRANK L. UPRIGHT, WALTER P. UPRIGHT, ELIZABETH WACKERHAGEN, MARTHA M. WALKER, NORMAN W. WALKER, RALPH B. WALKER, ELIZABETH G. WALLS, JEAN A. WATSON, SAMUEL S. WHEELER, CORA M. WHITEHEAD, DANIEL W. WILLIAMS, ELIZA S. WILLIAMS, HARRY LEE WILLIAMS, ELIZABETH L. WILSON, MARIAN B. WILSON, WILBUR G. WILSON, HOYT A. WISEMAN, VIRGINIA A. WISEMAN, ERNEST B. WOOD, SR., HOWARD L. WOOTERS, THOMAS S. WORSHAM, JACK D. ZIMMERMAN, and KENNETH A. GRIFFIN, individually for the benefit and on behalf of all others simlarly situated,

Petitioners-Plaintiffs,

v.

STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, HELEN A. POWERS Individually, BETSY JUSTUS in her capacity as SECRETARY OF

THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES Individually and in his capacity as TREASURER OF THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA FIREMEN'S AND RESCUE WORKER'S PENSION FUND, LEGISLATIVE RETIREMENT SYSTEM, NATIONAL GUARD RETIREMENT SYSTEM, RETIREMENT SYSTEMS FOR COUNTIES, CITIES, AND TOWNS, RETIREMENT SYSTEM FOR TEACHERS AND STATE EMPLOYEES, SUPPLEMENTAL RETIREMENT INCOME ACT OF 1984, SEPARATE INSURANCE BENEFIT PLANS FOR STATE AND LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS, SHERIFF'S SUPPLEMENTAL PENSION FUND OF 1985, ANNUITIES FOR STATE EMPLOYEES, REGISTER OF DEEDS SUPPLEMENTAL PENSION FUND, UNIFORM CONSOLIDATED JUDICIAL RETIREMENT SYSTEM, and PUBLIC EMPLOYEES BENEFITS SERVICES OF NORTH CAROLINA, FIREMAN'S SUPPLEMENTAL FUND (HICKORY), CHARLOTTE FIREFIGHTERS' RETIREMENT SYSTEM, OPTIONAL RETIREMENT PROGRAM FOR STATE INSTITUTIONS OF HIGHER EDUCATION,

Respondents-Defendants.

[Filed Dec. 6, 1991]

On discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 of an order of class certification entered on 31 December 1990 *nunc pro tunc* for 29 October 1990 and an order granting partial summary judgment for plaintiffs entered on 2 November 1990 by Lake, J., presiding at the 29 October 1990 session of Superior Court, Wake County. Heard in the Supreme Court 8 May 1991.

Womble, Carlyle, Sandridge, & Rice, by E. EUGENE BOYCE, and DONALD L. SMITH; WALLACE R. YOUNG, CHARLES H. TAYLOR, and J. FRANK HUSKINS, for plaintiff-appellees.

LACY H. THORNBURG, Attorney General, by EDWIN M. SPEAS, JR., Senior Deputy Attorney General, GEORGE W. BOYLAN, Special Deputy Attorney General, NORMA S. HARRELL, Special Deputy Attorney General, and DOUGLAS A. JOHNSTON, Assistant Attorney General, for defendant-appellants.

LACY H. THORNBURG, Attorney General, by GEORGE W. BOYLAN, Special Deputy Attorney General, and NORMA S. HARRELL, Special Deputy Attoney General, and by Robinson, Bradshaw, & Hinson, P.A., by JOHN R. WESTER and DAVID C. WRIGHT, III, for defendant Powers.

EXUM, Chief Justice.

In this appeal class plaintiffs challenge the validity under the North Carolina Constitution of a repealed tax exemption for vested participants in state and local government retirement plans. We do not reach the constitutional issue because plaintiffs failed to comply with N.C.G.S. § 105-267, under which an arguably invalid tax can be challenged and remedial action taken. We therefore hold plaintiffs' claims for a refund of taxes collected because of the repealed exemption and for an injunction prohibiting the collection of such taxes should have been dismissed.

I.

Like Swanson v. State of North Carolina, 329 N.C. 576, 407 S.E.2d 791 (1991), this case arose in the wake of Davis v. Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989). In *Davis* the Supreme Court held a state statute exempting state employees' retirement benefits from taxation but not granting the same exemption to their federal counterparts violated the constitutional

doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. Under that statute the federal government "consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111.

In response to *Davis*, the General Assembly repealed the income tax exemption for state and local retirement plans, 1989 Sess. Laws ch. 792, § 3.9 (hereinafter Chapter 792), and substituted a $4,000 annual exclusion for federal, state, and local government retirees. N.C.G.S. § 105-134.6 (1989). In *Swanson* this Court held that *Davis* did not apply retroactively to Chapter 792. Because the repealed statute was held to have been applicable until 28 March 1989, when *Davis* was decided, appellants—two classes of federal employees—were not entitled to refunds on taxes paid for tax years 1985 through 1989.

Class plaintiffs in this case are North Carolina state and local government employees whose retirement benefits vested on or before 12 August 1989, the ratification date of Chapter 792. Plaintiffs' complaint, filed 26 February 1990, named as defendants the State of North Carolina; the North Carolina Department of Revenue and the North Carolina Department of State Treasurer; Helen A. Powers, Secretary of the North Carolina Department of Revenue, in her individual and official capacities; Harlan E. Boyles, Treasurer of the State of North Carolina, in his individual and official capacities; and numerous state and local government retirement plans.

Plaintiffs allege their action is maintainable as a class action under N.C.G.S. § 1A-1, Rule 23: the class consists of "tens of thousands of people" whose identities are readily ascertainable from defendants' records, questions of law and fact critical to the action are common to all members of the class, representatives' claims typify

those of unnamed class members, and the relief sought would be effective and appropriate for all class members. The gravamen alleged is that under color of law defendant state officials engaged in a pattern, practice, or policy of unlawfully and unconstitutionally taxing plaintiff's pension benefits and that defendant retirement plans violated assurances that plaintiffs' benefits would be exempt from North Carolina income tax. Plaintiffs' claims for relief rest on a number of legal theories,[1] and they seek two forms of relief: the refund of taxes paid on benefits exempted from such taxation prior to 12 August 1989, and an injunction against the future collection of such taxes.

In their answer defendants disclaim knowledge of whether plaintiffs' action is suitable as a class action. They deny engaging under color of law in a pattern, practice, or policy of unlawfully and unconstitutionally taxing plaintiffs' pension benefits. Defendants further deny any contract between defendants and plaintiffs that provided plaintiffs an exemption from income taxes or, alternatively, that defendants have ever impaired the obligations of any such contract.[2]

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[1] The legal bases for plaintiffs' claims for relief include: breach of contract between plaintiffs and their governmental employers or pension plans; taking property in violation of due process and equal protection guarantees in the United States Constitution; and impairment of contractual obligations prohibited by Article I, Section 10 of the United States Constitution. In addition, plaintiffs allege that Chapter 792 violates numerous provisions of the North Carolina Constitution, including Article I, Section 16, in taxing acts previously done; Article I, Section 19, in violating guarantees to due process, equal protection, and against impairing obligations of contract; Article IV, Section 21, in diminishing the salaries of members of the judicial branch of government during their continuance in office; Article V, Section 5, in not stating the special object to which the levied tax is to be applied; and Article V, Section 6, in authorizing the use of retirement funds for purposes other than retirement benefits.

[2] Defenses asserted in defendant's answer include: the sovereign immunity of the State of North Carolina; the qualified immunity of

Pursuant to a superior court order for conditional class certification, letters dated 28 February, 26 March, 16 April, and 26 April, 1990 were sent to Helen A. Powers, Secretary of the North Carolina Department of Revenue. Citing the authority of N.C.G.S. § 105-267, the letters demanded "a refund of all taxes on any pension, benefits, or monies received from any present or former retirement system of the State of North Carolina heretofore paid for the tax year 1989 by any named or unnamed class member." They were signed by individuals whose names are not among those of the named plaintiffs in this action. Similar letters, dated 16 and 26 April 1990, which made collective demands for refunds under N.C.G.S. § 147-84, were sent to Harlan E. Boyles, Treasurer of the State of North Carolina. Among the affidavits offered as exhibits, only one named plaintiff averred he had sent an individual demand for refund of those taxes alleged to be invalid by the class. Like the collective demand letters, the individual demand, dated 30 April 1990, postdated the filing date of plaintiffs' complaint.

An order of class certification was filed 31 December 1990, *nunc pro tunc* for 29 October 1990.

On 2 November 1990 the superior court granted partial summary judgment for plaintiffs on two grounds: the removal of income tax exemptions on pensions under Chapter 792 is a retroactive tax in violation of the North Carolina Constitution, Article I, Section 16, and it diminishes judges' salaries in violation of the North Carolina Constitution, Article IV, Section 21. The court ordered that plaintiffs should recover taxes paid on retirement benefits and enjoined defendants from further collection of these taxes. On 31 December 1990 the court

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its officials; the unenforceability under the North Carolina Constitution, Article V, Section 2, of any contractual right to a tax exemption; plaintiffs' failure to pay taxes before suing to prevent their collection; and a bar by the statute of limitations of N.C.G.S. § 105-267 regarding recovery sought of taxes paid more than thirty days prior to the date of their refund demand.

granted summary judgment in favor of defendants Helen A. Powers and Harlan E. Boyles as to claims against them in their individual capacities. Plaintiffs and defendants each filed timely notice of appeal. On 4 March 1991 this Court allowed the parties' joint petition for discretionary review prior to determination by the Court of Appeals.

We hold the trial court erred in granting partial summary judgment for plaintiffs and in failing to grant summary judgment for defendants. Insofar as plaintiffs' complaint seeks a refund of 1989 taxes paid, it should have been dismissed for failure of plaintiffs to satisfy conditions precedent to such an action as required by N.C.G.S. § 105-267. Insofar as the complaint seeks injunctive relief to prevent the future collection of the challenged tax, it should have been dismissed because N.C.G.S. § 105-267 forecloses this kind of relief. We hold further that the trial court properly granted summary judgment for defendants Secretary Powers and Treasurer Boyles in their individual capacities.

II.

Defendants contend plaintiffs failed to follow the procedures mandated by N.C.G.S. § 105-267 for the refund of an invalid tax. We agree.

An action against the Department of Revenue is an action against the State, Buchan v. Shaw, 238 N.C. 522, 523, 78 S.E.2d 317, 317 (1953), and the State cannot be sued without its permission. Insurance Co. v. Unemployment Compensation Com., 217 N.C. 495, 499, 8 S.E.2d 619, 621 (1940).

> When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right—and the terms prescribed by

> the Legislature—are conditions precedent to the institution of the action.

Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961), *overruled on other grounds*, Smith v. State, 289 N.C. 303, 222 S.E. 2d 412 (1976) (when State enters into valid contract, it implicitly consents to be sued for its breach thereof). *See also* Kirkpatrick v. Currie, Comr. of Revenue, 250 N.C. 213, 216, 108 S.E.2d 209, 211 (1959); Duke v. Shaw, Comr. of Revenue, 247 N.C. 236, 239, 100 S.E.2d 506, 508 (1957); Insurance Co. v. Unemployment Compensation Com., 217 N.C. at 501, 8 S.E.2d at 622; Rotan v. State, 195 N.C. 291, 296, 141 S.E. 733, 735 (1928).

When a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267. Coca-Cola Co. v. Coble, 293 N.C. 565, 568, 238 S.E.2d 780, 783 (1977). *See also* Redevelopment Comm. v. Guilford County, 274 N.C. 585, 589, 164 S.E.2d 476, 479 (1968). "[A] constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in N.C.G.S. § 105-267." 47th Street Photo, Inc. v. Powers, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990), *disc. rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1991).

Section 105-267 provides:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from

> the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (1986). A taxpayer with "a valid defense to the enforcement of the collection of a tax" must first pay the tax, then demand a refund of that tax in writing within thirty days after payment. Only when the Secretary of Revenue fails to refund the tax within ninety days may the taxpayer sue the Secretary of Revenue for the amount demanded. Absent protest in the form of a demand for refund, a tax is voluntarily paid, and "voluntary payments of unconstitutional taxes are not refundable." Coca-Cola Co. v. Coble, 293 N.C. at 569, 238 S.E.2d at 783. The right to sue is a conditional right; the terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove they demanded a refund within thirty day after payment. Failure to do so forfeits the right to sue. Kirkpatrick v. Currin, Comr. of Revenue, 250 N.C. at 216, 108 S.E.2d at 211; Stenhouse v. Lynch, 37 N.C. App. 280, 281, 245 S.E.2d 830, 831 (1978).

Even when taxpayers are seeking a tax refund as a class,[3] the requisites of N.C.G.S. § 105-267 must be met. In Stenhouse v. Lynch, the Court of Appeals held that a class of plaintiffs who sought a refund of taxes on unemployment compensation were foreclosed by failure of any member of the class to make the requisite demand for refund. "[T]he taxes complained of cannot be recovered where paid voluntarily and without compulsion even though the taxes were levied unlawfully, in absence of demand for refund in compliance with the statute." 37 N.C. App. at 282, 245 S.E.2d at 831.

In this case all class demand letters sent to the Secretary of Revenue *were preceded by* the filing of plaintiffs' complaint. Even the letter sent by the sole class member who averred he had individually demanded a refund was dated 30 April 1990—nearly two months *after* 26 February 1990, the filing date of plaintiffs' complaint. We hold that this failure to satisfy the condition precedent of N.C.G.S. § 105-267 that the taxpayer demand a refund *before* instituting an action against the Secretary of Revenue foreclosed plaintiffs' action.

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[3] Under the circumstances of this case this Court need not decide whether a suit for a tax refund may be brought as a class action. Nevertheless, we note some support for this position in both the federal and North Carolina jurisprudence. *See* Crow v. Citicorp Acceptance Co., Inc., 319 N.C. 274, 285, 354 S.E.2d 459, 467 (1987) ("when our General Assembly has wished to prevent class actions to enforce statutory claims for relief . . . , it has said so expressly and unequivocally[;] . . . the failure of the General Assembly to expressly prohibit class actions to enforce the statutes under which plaintiffs claim relief [indicates] that it intended to allow them for such purposes); Gramling v. Maxwell, 52 F.2d 256, 261 (D.C.N.C. 1931) (remedy of individual actions at law under the Revenue Act of North Carolina (Pub. L. 1931, ch. 427) for recovery of taxes paid under protest inadequate compared with class action under that act, which "eliminates so much useless and cumbersome litigation"). We emphasize, however, that when a class of taxpayers seeks to sue for a refund under N.C.G.S. § 105-267, each member must individually satisfy the conditions precedent to suit mandated in that statute.

Moreover, although N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class, it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others. In this case, the Secretary rejected plaintiffs' class demands because, as she explained in her response of 26 April 1990,

> to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of state retirement income received by the taxpayer during the year.

The General Assembly did not prescribe the precise manner in which a demand for refund is to be made to the Secretary of Revenue. "This Court has held that under general authority to formulate regulations, an administrative agency of the State may prescribe by rule the procedure by which a right granted may be exercised." Comr. of Insurance v. North Carolina Rate Bureau, 300 N.C. 381, 403, 269 S.E.2d 547, 563, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). The Department of Revenue is an administrative agency of the State. *See* N.C.G.S. § 150B-2(1) (1987). "[W]e must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to executive officers the authority to accomplish the legislative purpose, guided of course by proper standards." *Id.* at 402, 269 S.E.2d at 563.

Reasons for requiring that refund demands include the information identified by the Secretary of Revenue evidently spring from a concern for the stability of the fisc:

> Where protest has been interposed, the [taxing authority] is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds.

Conklin v. Town of Southampton, 141 A.D.2d 596, 598, 529 N.Y.S.2d 517, 519 (1988) (quoting Mercury Mach. Importing Corp. v. City of New York, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957)). The requirements for a valid demand stipulated by the Secretary of Revenue evince both good judgment and good faith, and under such circumstances this Court cannot interfere. "[C]ourts were not created or vested with the authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials." Comr. of Insurance v. North Carolina Rate Bureau, 300 N.C. at 403, 269 S.E.2d at 563. We hold that plaintiffs' class demands for refunds followed neither the letter of the statute nor the reasonable criteria required by the Secretary of Revenue and were properly rejected and deemed invalid for purposes of suing for refunds under N.C.G.S. § 105-267.[4]

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[4] When class plaintiffs have attempted to challenge taxes by lawsuits in other states, appellate courts have generally held, as we have, that such suits cannot be maintained unless preceded by an individual notice, protest or demand. *See, e.g.*, Evans v. Arizona Dept. of Corrections, 139 Ariz. 321, 678 P.2d 506 (Ariz. App. 1983) (legislature did not intend for class claim to satisfy statutory notice requirement, which must be satisfied by each individual or entity having contract or negligence claim against state); Bozaich v. State, 32 Cal. App. 3d 688, 108 Cal. Rptr 392 (5 Dist. 1973) (if in inverse condemnation, tort, or breach of contract suits against state class claim is permitted in order to defeat time requirements for presentation of claims, such requirements would be meaningless); Hoffman v. Colorado State Bd. of Assessment Appeals, 683 P.2d 783 (Colo. 1984) (property tax assessment statute contemplates individualized treatment of claims rather than examination of general

We hold, absent specific statutory authorization for class or representative tax refund demands, such demands are ineffectual to satisfy this condition precedent to legal action for a tax refund under N.C.G.S. § 105-267.

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protest of class of plaintiffs; court therefore lacked jurisdiction to grant tax relief); Aronson v. Commonwealth, 401 Mass. 244, 516 N.E.2d 137 (1987) (where attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed), *cert. denied*, 488 U.S. 818, 102 L. Ed. 2d 36 (1988); Duffy v. Wetzler, 148 Misc. 2d 459, 555 N.Y.S.2d 543 (N.Y. Sup. 1990) (commencement of action purportedly on behalf of all similarly situated taxpayers does not constitute appropriate indication of protest by each proposed member of class); Gandolfi v. City of Yonkers, 101 A.D.2d 188, 475 N.Y.S. 429 (N.Y.A.D. 2 Dept. 1984) (tax refund claim is personal to the taxpayer; only those who have filed an appropriate protest may obtain a tax refund), *appeal dismissed*, 62 N.Y.2d 882, 467 N.E.2d 529, 478 N.Y.S.2d 865, *and* 62 N.Y.2d 604, 467 N.E.2d 532, 478 N.Y.S.2d 1023, *order aff'd*, 62 N.Y.2d 995, 468 N.E.2d 699, 479 N.Y.S.2d 517 (1984). *See also* Mervak v. Niagra Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687 (N.Y. Sup. 1979) (class action precluded by statutory notice of claim requirements because claims did not occur contemporaneously and timeliness of notice of claims must be dealt with on case-by-case basis); Salvaggio v. Houston Indep. School Dist., 709 S.W.2d 306 (Tex. App. Houston, 14th Dist. 1986) (class certification of taxpayers who had paid tax penalty properly denied where fact findings as to voluntariness of payment would be required, but properly granted to taxpayers against whom penalties had been assessed but not paid). *And see* Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977) (class claim under FTCA did not adequately present the claims of unnamed class members because not all claimants identifiable, no authority asserted by non-named plaintiffs to be represented by claim of those named, and no sum certain stated with respect to class claim). *Cf.* San Jose v. Superior Court, 12 Cal. 3d 447, 115 Cal. Rptr. 797, 525 P.2d 701 (1974) (under statute providing that "claims shall be presented by the claimant or by a person acting on his behalf," class representative claim that included representative's name, address, date, occurrence, and amount claimed, plus "sufficient information to identify and make ascertainable the class itself" satisfies statutory precondition to inverse condemnation and nuisance suit against state); Lattin v. Franchise Tax Bd., 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1 Dist. 1977) (no jurisdiction to maintain class action

III.

Neither is injunctive relief as to future collection of the challenged tax available to plaintiffs.

Section 105-267 begins: "No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter." N.C.G.S. § 105-267 (1986). The absolute prohibition against injunction to restrain the collection of any tax governed by Subchapter I, "Levy of Taxes," N.C.G.S. §§ 105-1 through 105-270 (1989), differs significantly from the conditional prohibition in Subchapter II, "Listing, Appraisal, and Assessment of Property and Collection of Taxes on Property," which provides:

> No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

N.C.G.S. § 105-379 (1989). The latter statute has been viewed as permitting an "equitable exception[]" to "the broad exclusionary language therein," Enterprises, Inc. v. Dept. of Motor Vehicles, 290 N.C. 450, 455, 226 S.E.2d 336, 339 (1976), an exception that is notably lacking from its counterpart in Subchapter I.

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when claim for refund made by class representatives only in their own behalf, yet complaint filed on behalf of putative class). *But see* Andrew S. Arena, Inc. v. Superior Court, 163 Ariz. 423, 788 P.2d 1174 (1990) (when identities and locations of class members discoverable, so as to allow county to investigate claim and assess liability, class claim permissible); Santa Barbara Optical Co. v. State Bd. of Equalization, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (2 Dist. 1975) (when statute does not require specific identification of each claimant in advance of complaint, "claimant" should be equated with class itself). *See generally* Annot. "State Class Action to Recover Taxes," 10 A.L.R.4th 655 (1981); Annot. "Maintenance of Class Action Against Governmental Entity as Affected by Requirement of Notice of Claim," 76 A.L.R.3d 1244 (1977).

The appellate courts of this state have frequently reiterated "the general rule that there shall be no injunctive or declaratory relief to prevent the collection of a tax, *i.e.*, the taxpayer must pay the tax and bring suit for a refund." *Id. See also* Oil Corp. v. Clayton, Comr. of Revenue, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966) (requiring the taxpayer to pay the amount of the disputed tax and sue the State for its recovery, a method available to taxpayers since 1887, is the appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute); Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. at 173-74, 118 S.E.2d at 792 (Declaratory Judgment Act has not been permitted to supplant or substitute for the specific statutory proceeding for testing the constitutionality of a tax statute); 47th Street Photo, Inc. v. Powers, 100 N.C. App. at 748, 298 S.E.2d at 54 (requirement that the taxpayer pay the tax, then demand a refund "is the appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him").

Injunctive relief for the imposition of personal income taxes challenged on constitutional grounds has never been approved by our appellate courts. Our trial courts have properly enjoined the collection of taxes alleged to be constitutionally infirm only under the authority of statutes other than N.C.G.S. § 105-267. Thus, under statutes antedating the enactment of section 105-267 in the Revenue Act of 1939 (1939 N.C. Sess. Laws ch. 158, § 936) and its predecessor, 1931 N.C. Sess. Laws ch. 427, § 510, this Court held plaintiffs were entitled upon the pleadings to a perpetual injunction against the collection of unconstitutional town taxes. Young v. Town of Henderson, 76 N.C. 420, 424 (1877). And this Court has approved in principle injunctions against the collection of illegal, invalid, or unauthorized taxes under N.C.G.S. § 105-379 or N.C.G.S. § 105-406 (repealed by 1971 N.C. Sess. Laws ch. 806, § 3) or their common predecessor statutes. *See*,

e.g., Redevelopment Comm. v. Guilford County, 274 N.C. 585, 588-89, 164 S.E.2d 476, 478-79 (1968) (collection of illegal or invalid tax—as distinguished from an erroneous tax—may be enjoined); Wynn v. Trustees, 255 N.C. 594, 599, 122 S.E.2d 404, 407 (1961) (injunction available to taxpayer when tax is challenged because illegal, invalid, or levied or assessed for unauthorized purpose); Barbee v. Comrs. of Wake, 210 N.C. 717, 719, 188 S.E. 314, 315 (1936) (unless otherwise provided by statute, injunction at the instance of a taxpayer is regarded as an appropriate remedy to resist the levy of an invalid assessment or to restrain the collection of an illegal tax). *See also* Nicholson v. Education Assistance Authority, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) ("A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose.").

Section 105-267, by contrast, bars courts absolutely from entertaining suits of any kind brought for the purpose of preventing the collection of any tax imposed in Subchapter I. Since the taxes challenged by plaintiffs were Subchapter I taxes, we hold that the trial court erred in enjoining defendants from further collection of taxes paid on plaintiffs' retirement benefits. Under section 105-267 plaintiffs' remedies are restricted to a refund of any illegal, invalid, or unauthorized tax, but only if the prerequisites of that statute have been followed. This, as we have held, plaintiffs failed to do.

IV.

Finally, plaintiffs appeal the trial court's order granting summary judgment for defendants Helen A. Powers, Secretary of the North Carolina Department of Revenue, and Harlan E. Boyles, Treasurer of the State of North Carolina, as to claims against them in their individual capacities.

In response to class refund demands sent to the Department of the Treasury, the Department of Justice conveyed the position of the State Treasurer: N.C.G.S. § 147-84 "simply sets forth the principle that whenever taxes have been by clerical error, misinterpretation of law, or otherwise, collected and paid into the state treasury in excess of the amount found legally due the state, the excess amount shall be refunded to the person entitled thereto. The determination of whether amounts are legally due and the determination of persons entitled thereto are not within the authority of the State Treasurer to make." Secretary Powers rejected plaintiffs' class demand because it lacked specific information necessary to identify the numbers of claimants and to ascertain amounts owed.

Plaintiffs alleged that, in rejecting their refund demands, defendants Powers and Boyles failed in their duties "to support and maintain the Constitution and laws of the United States and . . . of North Carolina," N.C. Const. art. VI, § 7, insofar as they refused to refund tax monies collected in derogation of federal and state constitutional provisions.[5]

Defendants answered and argue on appeal that Powers and Boyles acted "within the scope of their authority as

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[5] Plaintiffs alleged specifically that the refusal of both officials (1) "amounts to a taking of property without just compensation, is arbitrary and capricious, is a violation of due process and equal protection"; (2) impairs the obligations of contract under color of law in violation of the United States Constitution, Article I, Section 10; (3) violates due process and equal protection guarantees of the North Carolina Constitution; (4) violates state constitutional prohibitions against retroactive taxation, N.C. Const. art. I, § 16, and the diminution of judicial salaries during continuance in office, N.C. Const. art. IV, § 21; (5) unconstitutionally levies a tax without stating the specific object to which the tax is to be applied, N.C. Const. art. V, § 5; and (6) unconstitutionally authorizes the use of retirement funds for purposes other than retirement benefits and purposes, N.C. Const. art. V, § 6.

officers of the State of North Carolina in the good faith belief that they were acting lawfully in the best interests of the State," and that they were thus entitled to the defenses of qualified immunity and the immunity of public officials. A public official is not liable for damages in an action brought under 15 [sic] U.S.C. § 1983 unless the conduct complained of "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 396, 398 (1982). "The right [allegedly violated by the official] must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986). *See also* Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 531 (1987) (unlawfulness must be apparent in the light of pre-existing law); Danenberger v. Johnson, 821 F.2d 361, 365 (7th Cir. 1987) (to be "clearly established," the right allegedly violated "must be clearly recognized in existing case law.").

In Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that Helen Powers was entitled to immunity from suit for collecting taxes from federal retirees over a four-year period preceding the Supeme Court's decision in Davis v. Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891, and so allegedly violating the constitutional doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939. *Swanson*, 937 F.2d at 966. The Fourth Circuit observed that "[l]egislative classifications . . . are presumed to be constitutional." *Swanson*, 937 F.2d at 969 (quoting New York State Club Ass'n v. City of New York, 487 U.S. 1, 17, 101 L. Ed. 2d 1, 19 (1988)). "Rarely will a state official who simply enforces a presumptively valid statute thereby lose her immunity from suit." *Swanson*, 937 F.2d at 968. "[T]he greater the similarity of the existing case law to the situation at

hand, the greater its guidance to a reasonable state official." *Id.* at 969. "The usual practice must . . . be that '[u]ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature.'" *Id.* (quoting Lemon v. Kurtzman, 411 U.S. 192, 208, 36 L. Ed. 2d 151, 165 (1973)).

We concur with and adopt the reasoning and conclusions of *Swanson* with regard to all claims against defendants Powers and Boyles grounded in the federal Constitution. Public officials are not seers. Although they may be "charged with the knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law." *Swanson*, 937 F.2d at 968 (quoting Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989)). We will not hold public officials of this state to more perfect knowledge of the law than is apparent in appellate court reports. The constitutionality of Chapter 792 has not yet been examined either by federal courts or by the appellate courts of this state.[6] We

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[6] Plaintiffs' assertion that Chapter 792 unconstitutionally impairs obligations of contract is supported, they contend, by Mathews v. Board of Trustees of the Asheville Policeman's Pension and Disability Fund, 96 N.C. App. 186, 385 S.E.2d 343 (1989), *disc. rev. denied*, 326 N.C. 364, 389 S.E.2d 814 (1990), and Simpson v. North Carolina Local Governmental Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). In dicta the Court of Appeals in *Mathews* agreed with a Florida court "and every jurisdiction which has addressed the distinction between mandatory and voluntary participation [in a pension plan] . . . that 'benefits provided for employees under a voluntary pension or retirement plan created by an act of the legislature may not be modified or reduced by subsequent amendatory legislation for the reason that those electing to participate in such voluntary plans acquire vested rights of contract to the benefits provided therein upon acceptance of the plan which rights may not be impaired by subsequent amendments to the act.'" *Mathews*, 96 N.C. App. at 190, 385 S.E.2d at 345 (quoting State v. City of Jacksonville Beach, 142 So.2d 349, 353 (Fla. App. 1962), *aff'd*, 151 So. 2d 430 (Fla. 1963)).

In *Simpson*, the Court of Appeals held the relationship between vested members of a government pension fund and the fund itself

hold that, absent the guidance of such opinions, defendants Powers and Boyles were entitled to immunity from civil liability for complying with a statute that was presumptively valid.

We draw parallel conclusions regarding plaintiffs' claims brought under the North Carolina Constitution. In this jurisdiction an official may be held liable when he acts maliciously or corruptly, when he acts beyond the scope of his duties, or when he fails to act at all. "As long as a public official lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." Smith v. State, 289 at 331, 222 S.E.2d at 430.

The oath of office for both the Secretary of the North Carolina Department of Revenue and the Treasurer of North Carolina requires that the official "will support and maintain the Constitution and laws" of the nation and the state. N.C. Const. art. VI, § 7. Among the duties and obligations of the Secretary of Revenue is responsibility for all executive functions relative to revenue collection. N.C.G.S. § 143B-219 (1990). These include re-

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is contractual and that a statute that diminished an employees' calculated benefits impairs those contractual rights. Such impairment is not necessarily unconstitutional, however, "[S]tates may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth." *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94. Impairment of contracts does not violate the Contract Clause when it is "reasonable and necessary to serve an important public purpose." *Id.* at 325, 363 S.E.2d at 94.

Although *Simpson* demonstrates that plaintiffs' impairment of contracts claim has some basis in state law, it also indicates that the question whether an act unconstitutionally impairs the right to contract violates the Contract Clause is one courts must resolve case by case. Under such circumstances, and cognizant that "[t]he power of taxation . . . shall never be surrendered, suspended, or contracted away," N.C. Const. art. V, § 2(1), Secretary Powers properly enforced Chapter 792 because the law in this regard was not "clearly established."

funding taxes paid by taxpayers who have a valid defense to the collection of such taxes. N.C.G.S. § 105-267 (1989). The State Treasurer is similarly responsible for "the efficient and faithful exercise of the responsibilities of his office," N.C.G.S. § 147-68(e) (1987), including refunding taxes erroneously collected:

> Whenever taxes or other receipts of any kind are or have been by clerical error, misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount found legally due the State, said excess amount shall be refunded to the person entitled thereto.

N.C.G.S. § 147-84 (1987).

The official duties of neither the Secretary of Revenue nor the Treasurer include responsibility to judge the constitutionality of the statutes authorizing and regulating their departmental functions. Like administrative boards, these offices "have only such authority as is properly conferred upon them by the Legislature. The question of constitutionality of a statute is for the judicial branch." Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. at 173, 118 S.E.2d at 796. *See also* Oil Corp. v. Clayton Comr. of Revenue, 267 N.C. at 20, 147 S.E.2d at 526 ("The law does not contemplate that administrative boards shall pass upon constitutional questions."). Although the Secretary of Revenue is authorized by N.C.G.S. § 105-266.1 to refund excessive or incorrect taxes paid by a taxpayer who applies for such refund according to the statutory requisites of section 105-266.1, she is not authorized by that statute or by section 105-267 "to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts." Coca-Cola Co. v. Coble, 293 N.C. at 568, 238 S.E.2d at 783. Like section 105-266.1, authorization for the Treasurer to refund excess taxes under N.C.G.S. § 147-68(e) is limited to taxes erroneously paid and does not include those challenged as unconstitutional.

As we have held with reference to laws alleged to violate the federal Constitution, laws that officials bear a statutory and constitutional duty to uphold are presumptively valid, regardless of allegations that these laws violate provisions of the North Carolina Constitution. Challenges to such laws on constitutional grounds are for the courts alone to decide. Until our courts indicate otherwise, an official who enforces a law as a responsibility of the office is entitled to act on the presumption of validity and "to carry forward the directives of the state legislature" with impunity. We hold neither Secretary Powers nor Treasurer Boyles failed in or wrongfully performed a duty to enforce N.C.G.S. § 105-267 or N.C.G.S. § 147-68 in not refunding taxes paid under that Chapter.

For the reasons given, the trial court's entry of partial summary judgment for plaintiffs is reversed and the case remanded to the Superior Court, Wake County, for entry of summary judgment in favor of defendants. The trial court's entry of summary judgment in favor of Secretary Powers and Treasurer Boyles in their individual capacities is affirmed.

REVERSED IN PART AND REMANDED;
AFFIRMED IN PART.

Justice MITCHELL concurring in part and dissenting in part.

Like the majority, I believe that the trial court was correct in entering summary judgment for the defendants Powers and Boyles as to the claims made against them in their individual capacities. Therefore, I concur in Part IV of the opinion of the majority which affirms summary judgment entered by the trial court in favor of those two defendants.

I dissent from those parts of the opinion of the majority which (1) reverse the trial court's partial summary judgment for the plaintiffs and (2) remand this case to the Superior Court, Wake County, for entry of summary judgment in favor of the remaining defendants.

The majority concludes that the taxpayer-plaintiffs could not bring this suit because they failed to follow the procedures mandated by N.C.G.S. § 105-267 for the refund of an invalid tax. I do not agree.

Clearly, N.C.G.S. § 105-267 does not expressly preclude collective—as opposed to individual—demands for refunds of taxes. In my view, the terms "person" and "taxpayer" as used in that statute must be held to encompass both individual and collective taxpayers. N.C.G.S. § 12-3 (1990) (words importing the singular to be construed as including the plural unless inconsistent with the manifest intent of the General Assembly). *See* Santa Barbara Optical Co. v. State Bd. of Equalization, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (2 Dist. 1975) (terms in a tax statute similar to N.C.G.S. § 105-267 held to include a class). Therefore, the plaintiffs could make a collective demand for a refund under the statute.

Further, I believe that the legislative purpose behind the demand requirement in the statute simply is to give the Department of Revenue fair notice of a possible obligation to refund taxes and an opportunity to prepare to meet that contingency. The essential requirements of the

statute in this regard were complied with, in that the Department was given sufficient notice as to both the basis for the challenge to the legitimacy of the tax and the scope of the protesting class. *See* Mercury Mach. Importing Corp. v. New York, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957). Therefore, the trial court correctly held that the plaintiffs'

> demands constituted effective demand for refund on behalf of all named and unnamed class members and preserved their rights to claim and seek refunds of all monies unlawfully imposed and collected as a result of the enactment of 1989 Sess. Laws Ch. 792, which had the effect of removing an income exemption on benefits received or monies paid by virtue of State and Local Government Retirement plans or systems.

The trial court was correct in holding that the collective demand on behalf of the plaintiffs had sufficiently complied with any lawful conditions precedent to the bringing of an action such as that brought by these plaintiffs. Therefore, the majority errs in remanding this case for the entry of summary judgment for the defendants on these taxpayers' claims for refunds of taxes allegedly collected unlawfully and unconstitutionally.

APPENDIX B

SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR PRICE, Clerk
Justice Building, 2 E. Morgan Street
Raleigh, North Carolina 27601
(919) 733-3723

27 December 1991

Mr. G. Eugene Boyce
Attorney at Law
P. O. Box 831
Raleigh, NC 27602

Re: BAILEY v. STATE OF N.C., *et al.*
No. 105PA91

Dear Mr. Boyce:

Motion by Plaintiffs for Stay or Other Appropriate Order has been filed and the following order entered:

> "Denied by order of the Court in conference this the 26th day of December 1991.
>
> /s/ Martin, J.
> For the Court"

Very truly yours,

/s/ Christie Speir Price
CHRISTIE SPEIR PRICE
Clerk of Supreme Court

CSP:ksr
xc:
Mr. Donald L. Smith, Attorney at Law
Mr. Wallace R. Young, Attorney at Law
Mesesrs. John R. Wester and David C. Wright, III,
Attorneys at Law

Mr. Charles H. Taylor, Attorney at Law
Mr. J. Frank Huskins, Attorney at Law
Ms. Norma S. Harrell, Special Deputy Attorney General
Mr. George W. Boylan, Special Deputy Attorney General
Mr. Douglas A. Johnston, Assistant Attorney General
Mr. Edwin M. Speas, Jr., Senior Deputy Attorney General

APPENDIX C

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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90 CVS 02266

JAMES H. POU BAILEY, *et al.*,
Petitioners-Plaintiffs

vs.

STATE OF NORTH CAROLINA, *et al.*,
Respondents-Defendants

PARTIAL SUMMARY JUDGMENT

[Filed Nov. 2, 1990]

THIS CAUSE COMING ON TO BE HEARD before the undersigned Judge of Superior Court of the General Court of Justice of Wake County upon Motion of Plaintiffs for Partial Summary Judgment against Defendants, excluding former Secretary Powers individually and Treasurer, Harlan E. Boyles, individually; and the Court having ruled in open court on October 29, 1990 that this action be certified as a class action; and the Court having heard the arguments of counsel and having examined the pleadings, affidavits and evidence presented by the parties herein, and being of the opinion that Plaintiffs' Motion for Partial Summary Judgment should be denied in part and allowed in part; it is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. As to Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for relief set forth in Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph e of the Second Amended Complaint, the Court finds no genuine issue of material fact. The Court concludes that Summary Judgment on this claim is appropriately rendered against Plaintiffs. Therefore, as a matter of law judgment is hereby entered in favor of Defendants on Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph e of the Second Amended Complaint.

2. As to Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for relief set forth in Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph a of the Second Amended Complaint, the Court finds no genuine issue of material fact. Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for relief set forth in Plaintiffs' Second Amended Complaint, specifically in Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph a of the Amended Complaint, is allowed. Therefore, as a matter of law, final judgment on this claim is hereby entered in favor of Plaintiffs and Plaintiffs shall have and recover their taxes paid on retirement benefits as prayed for in the Second Amended Complaint and defendants are hereby enjoined from further collection of said taxes.

3. As to the Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for relief set forth in Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph c of the Second Amended Complaint, the Court finds no genuine issue of material fact. Plaintiffs' Motion for Summary Judgment on said Plaintiffs' claim for relief set forth in Plaintiffs' Amended Complaint, specifically in Plaintiffs' Third Claim for Relief, Paragraph 88, subparagraph c of the Second Amended Complaint, is allowed. Therefore, as a matter of law, final judgment on this claim is hereby entered in favor of Plaintiffs' [sic] and Plaintiffs shall have and recover their taxes paid

on retirement benefits as prayed for in the Second Amended Complaint and Defendants are hereby enjoined from further collection of said taxes.

The Court shall retain jurisdiction of this matter for the signing of the order entered orally in open court approving class certification and the court retains jurisdiction for further proceedings relating to class administration and notification, the payment of tax refunds to class members, the approval of attorney fees and expenses to be assessed against any common fund that may be hereafter authorized for payment of said refunds and for entry of other Orders which may be appropiate to enforce the relief granted Plaintiffs herein. The parties in open court stipulated that this judgment may be entered out of term and out of the county, if necessary.

This the 1st day of November, 1990.

/s/ I. Beverly Lake, Jr.
I. BEVERLY LAKE, JR.
Judge of Superior Court

APPENDIX D

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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90 CVS 2266

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, MELVIN T. MUNN, FRED BENSON, JAMES H. KLEU, JOSEPH GILMER BINKLEY, EULA G. BULLARD, MILDRED C. SEAWELL, EMILY B. JONES, SAMUEL T. ARRINGTON, JOHN W. CARTWRIGHT, DAVID L. BRITT, MATTIE E. LASSITER, PAUL LEE SALISBURY, JR., CHARLES S. MANOOCH, JR., ROY E. THOMPSON, and CLYDE R. SHOOK, JOHN H. ALLEN, JESSE M. ALMON, EDWIN C. GUY, GEORGE SMITH, ERNEST P. CAIN, THOMAS DALE JOHNSON, BILLY A. BAKER, and ROSALIE T. ADAMS, VICTOR ALDRIDGE, SR., CLIFTON A. ANDERSON, HELEN L. ANDREWS, CHARLES E. ARRINGTON, LILLIAN B. ARRINGTON, WILLIAM K. AUBRY, JR., W. PRESTON BARBER, JR., PARKER N. BARE, MARGARET H. BARKLEY, JACKIE D. BARRETT, JAMES B. BARRETT, ARTHUR C. BEAMON, FRANK M. BENDER, WILLIAM D. BERG, THOMAS W. BERRIER, PAULINE J. BLACKBURN, BRENDA W. BLANCHFIELD, ROBERT L. BLEVINS, ELIZABETH F. BOLICH, JUNIOUS L. BOST, ELLIE L. BOYLES, HENRY L. BRIDGES, LAWRENCE R. BRIDGES, CAREY H. BROADWELL, CHANCEL T. BROWN, JOAN W. BROWN, MARGARET M. BROWN, JOHN W. BUCHAN, EUNICE W. BULLARD, DEWEY L. BUTLER, MCCAULEY C. BYRUM, GERTRUDE G. CAHOON, JOSEPH H. CALDER, CATHERINE N. CANN, DOROTHY T. CARMICHAEL, MAURICE O. CATON, ROBERT A. CAUDLE, MARGARET H. CHAPMAN, ODELL CHILDRESS, CARL L. CLARKE, EDWARD L. CLAY, SR., SHARI T.

CLINE, SELMA C. CLODFELTER, HAROLD D. COLEY, MATALINE COLLETTE, ROBERTA M. COOK, ANNA L. COOPER, BERTIE R. COOPER, CHARLIE C. COOPER, CARLYLE C. CRAVEN, N. CHRISTEL C. CREWS, DONALD E. CURTIS, VIOLET H. DANIEL, MILDRED K. DAVIS, HOWARD DICKEY, JOHN B. DILLARD, ESTHER P. DUNCAN, T. J. DUNCAN, HELEN M. DUPREE, JOSEPH E. DUPREE, JESSE W. EDWARDS, CHARLES B. ELKS, DAN R. EMORY, CHARLES F. ENGLISH, MARTIN W. ERICSON, JAMES M. EUBANKS, JR., RUTH U. FARTHING, NELLIE D. FOUNTAIN, J. WARREN FRANKLIN, ZENNA H. FRANKLIN, EMMA LEE FURCHES, ALFRED H. GARNER, EVELYN C. GARRISON, FRED W. GENTRY, CATHERINE M. GILBERT, MEREDITH H. GILBERT, IVEY B. GORDON, IZORIA S. GORDON, LOUIS N. GOSSELIN, GLADYS P. GREEN, CONSUELLA GREENWOOD, JOHN L. HAIRSTON, RUTH A. HAIRSTON, JAMES A. HAMMONS, SAMUEL L. HARMON, MARY J. HAUSER, ELMO F. HICKS, IDALIA O. HIGH, CARLEE F. HODGE, LUCY GREENE HUBBARD, HUGHES J. HUNT, KAY C. HURT, HAROLD D. ISENBERG, BEN M. ISENHOUR, MARY G. ISENHOUR, MARY P.H. JACKSON, LILLIAN K. JOHNSON, VIRGINIA P. JOHNSON, WALTER C. JOHNSON, JR., C. MYLES JONES, JOE E. JONES, JUNE R. JONES, ROBERT P. JONES, WALTER C. JOYCE, SR., ODELL M. KEARNEY, RUTH H. KESSLER, JOHN KIGER, VELMA D. KING, FRANCES S. KISER, JACOB KOOMEN, JR., DAVID T. LAMBERT, WALTON S. LATTA, TRUDIE J. LAWSON, CLARENCE T. LEINBACH, JR., WALTER G. LEMING, VIRGINIA P. LEWIS, YATES W. LOWE, JAMES A. LYERLY, HARRIETTE B. MCCORMICK, L. JAMES MCDANIEL, E. R. MCKAY, HARRY B. MCKEE, W. S. MCKINNEY, DORIS W. MCLAMB, JOSEPH T. MCMILLIAN, JAMES F. MALCOLM, EDWARD G. MANNING, JAMES H. MARCH, ELZA VAN MARION, MARY H. MARTIN, LESTER G. MASENCUP, HELEN S. MAST, JAMES B. MAST, JR., MELVILLE L. MAUNEY, ROBERT A. MAYER, VIRGINIA H. MICKEY, NONA S. MILLER, RUTH MINICK, GROVER F. MINOR, CHARLES B. MIRACLE, JACK K. MOORE, LOLA

T. MORETZ, LEO G. MORGAN, WILLIAM F. MORGAN, BRADY W. MULLINAX, SR., JOHN I. NICHOLS, LUCINDA L. NOWLIN, DONALD S. OVERCASH, DWIGHT W. PADGETT, CALVIN C. PEARCE, WILLIAM W. PEEK, GEORGE W. PEELER, MICHAEL PELECH, JUANITA B. PENN, DIANE S. PEOPLES, CHARLES B. PIERCE, EVELYN D. PIERCE, SYLVIA S. PINYAN, MILDRED R. POINDEXTER, WINNIE D. POTTS, LEVI GLEN POWELL, THOMAS C. PRATT, CHARLES W. RANKIN, RALPH L. RAY, PATSY M. REYNOLDS, MATTIE B. RICHARD, ELNA C. ROSE, FRANCES T. SACRINTY, EDNA G. SCALES, MELVIN J. SCALES, VALDA E. SCHMITT, WORTH G. SEATS, CHARLES SELLE, NELSON L. SHEAROUSE, CONRAD H. SHELTON, MARY L. SHELTON, ELIZABETH H. SHERMER, BLANCHE S. SHIPP, RALPH N. SHUE, FRANCIS C. SIMMONS, JOE L. SIMMONS, HAROLD E. SIMPSON, RICHARD H. SIMPSON, REUBEN E. SLADE, GARNET N. SMART, LENORA S. SMITH, LONNIE H. SMITH, MATTIE S. SMITH, PAUL M. SMITH, FRANCES J. SNOW, EULALIA T. SOLOMON, LUCILE J. SPEAS, DAVID W. SPIVEY, CHARLES A. SPEED, CAROLINE G. SPENCER, THOMAS S. THOMPSON, ELLA BELLE TILLMAN, DORIS E. TUCKER, JUSTUS M. TUCKER, RUTH L. TUCKER, MARGARET M. TUGMAN, FRANK L. UPRIGHT, WALTER P. UPRIGHT, ELIZABETH W. WACKERHAGEN, MARTHA M. WALKER, NORMAN W. WALKER, RALPH B. WALKER, ELIZABETH G. WALLS, JEAN A. WATSON, SAMUEL S. WHEELER, CORA M. WHITEHEAD, DANIEL W. WILLIAMS, ELIZA S. WILLIAMS, HARRY LEE WILLIAMS, ELIZABETH L. WILSON, MARIAN B. WILSON, WILBUR G. WILSON, HOYT A. WISEMAN, VIRGINIA A. WISEMAN, ERNEST B. WOOD, SR., HOWARD L. WOOTERS, THOMAS S. WORSHAM, JACK D. ZIMMERMAN, and KENNETH A. GRIFFIN, individually for the benefit and on behalf of all others similarly situated,

Petitioners-Plaintiffs,

VS.

STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, HELEN A. POWERS Individ-

ually, BETSY JUSTUS in her capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES Individually and in his capacity as TREASURER OF THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA FIREMEN'S AND RESCUE WORKER'S PENSION FUND, LEGISLATIVE RETIREMENT SYSTEM, NATIONAL GUARD RETIREMENT SYSTEM, RETIREMENT SYSTEMS FOR COUNTIES, CITIES, AND TOWNS, RETIREMENT SYSTEM FOR TEACHERS AND STATE EMPLOYEES, SUPPLEMENTAL RETIREMENT INCOME ACT OF 1984, SEPARATE INSURANCE BENEFIT PLANS FOR STATE AND LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS, SHERIFF'S SUPPLEMENTAL PENSION FUND OF 1985, ANNUITIES FOR STATE EMPLOYEES, REGISTER OF DEEDS SUPPLEMENTAL PENSION FUND, UNIFORM CONSOLIDATED JUDICIAL RETIREMENT SYSTEM, and PUBLIC EMPLOYEES BENEFITS SERVICES OF NORTH CAROLINA, FIREMAN'S SUPPLEMENTAL FUND (HICKORY), CHARLOTTE FIREFIGHTERS' RETIREMENT SYSTEM, OPTIONAL RETIREMENT PROGRAM FOR STATE INSTITUTIONS OF HIGHER EDUCATION,

Respondents-Defendants.

SECOND AMENDED AND SUPPLEMENTAL PETITION AND COMPLAINT

[Filed Sept. 10, 1990]

NOW COME the Petitioners-Plaintiffs through counsel and further amend their Petition and Complaint as follows:

1. Petitioner-Plaintiff, James H. Pou Bailey is a resident of Wake County, a retired Regular Judge of the Superior Court and a present Recall Judge of the Superior Court, and a member of the Uniform Consolidated

Judicial Retirement System, who receives a pension or benefits therefrom.

2. Petitioner-Plaintiff, A. Pilston Godwin is a resident of Wake County, and a retired Regular Judge of the Superior Court, and a member of the Judicial Retirement System, in effect prior to 1974, who receives a pension or benefits therefrom.

3. Petitioner-Plaintiff, Harry L. Underwood is a resident of Forsyth County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

4. Petitioner-Plaintiff Melvin T. Munn is a resident of Wake County, a retired Deputy Sheriff thereof, and a member of the Separate Insurance Benefits Plans for State and Local Governmental Law Enforcement Officers, who receives a pension or benefits therefrom.

5. Petitioner-Plaintiff, Fred Benson is a resident of Wake County, a Deputy Sheriff thereof, and a member of Separate Insurance Benefits Plans for State and Local Governmental Law Enforcement Officers.

6. Petitioner-Plaintiff, James H. Kleu is a resident of Forsyth County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

7. Petitioner-Plaintiff, Joseph Gilmer Binkley is a resident of Forsyth County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

8. Petitioner-Plaintiff, Eula G. Bullard is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and

State Employees, who receives a pension or benefits therefrom.

9. Petitioner-Plaintiff, Mildred C. Seawell is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

10. Petitioner-Plaintiff, Emily B. Jones is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

11. Petitioner-Plaintiff, Samuel T. Arrington is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

12. Petitioner-Plaintiff, John W. Cartwright is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

13. Petitioner-Plaintiff, David L. Britt is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

14. Petitioner-Plaintiff, Mattie E. Lassiter is a resident of Wake County, and a retired public school teacher, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

15. Petitioner-Plaintiff, Paul Lee Salisbury, Jr. is a resident of Wake County, and a retired state employee,

and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

16. Petitioner-Plaintiff, Charles S. Manooch, Jr. is a resident of Wake County, and a retired state employee, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

17. Petitioner-Plaintiff, Roy E. Thompson is a resident of Wake County, and a retired state employee, and a member of the Retirement System for Teachers and State Employees, who receives a pension or benefits therefrom.

18. Petitioner-Plaintiff, Clyde R. Shook is a resident of Surry County, and a retired state employee and North Carolina National Guardsman, and a member of the Retirement System for Teachers and State Employees and the National Guard Retirement System, who receives pensions or benefits therefrom.

19. Petitioner-Plaintiff, John H. Allen is a resident of Cleveland County, and a retired sheriff, and a member of the Retirement Systems for Counties, Cities, and Towns, who receives a pension or benefits therefrom.

20. Petitioner-Plaintiff, Jesse M. Almon is a resident of Guilford County, and a retired police officer, and a member of the Retirement System for Counties, Cities, and Towns and the Supplemental Retirement Income Act of 1984, who receives pensions or benefits therefrom.

21. Petitioner-Plaintiff, Edwin C. Guy is a resident of Wake County, and a retired law enforcement officer, and a member of the Separate Insurance Benefits Plans for State and Local Governmental Law Enforcement Officers, who receives a pension or benefits therefrom.

22. Petitioner-Plaintiff, George H. Smith is a resident of Cabarrus County, and a retired law enforcement officer, and a member of the Separate Insurance Benefit

Plans for State and Local Government Law Enforcement Officers, who receives a pension or benefits therefrom.

23. Petitioner-Plaintiff, Ernest P. Cain is a resident of Guilford County, and a retired teacher, and a member of the Retirement System for Teachers and State Employees, the Supplemental Retirement Income Act of 1984, and the Public Employee Benefits Services of North Carolina, who receives pensions or benefits therefrom.

24. Petitioner-Plaintiff Thomas Dale Johnson is a resident of Catawba County, and a retired sheriff, and a member of the Sheriff's Supplemental Pension Fund of 1985, who receives a pension or benefits therefrom.

25. Petitioner-Plaintiff, Billy A. Baker is a resident of Forsyth County, and a retired state employee, and a member of the Retirement System for Teachers and State Employees, the Supplemental Retirement Income Act of 1984, and the Public Employee Benefits Services of North Carolina, who receives pensions or benefits therefrom.

26. Petitioner-Plaintiff, Meredith H. Gilbert is a resident of Forsyth County, and a retired fireman, and a member of the North Carolina Firemen's and Rescue Workers' Pension Fund, who receives a pension or benefits therefrom.

27. Petitioner-Plaintiff, Ned R. Smith is a resident of Forsyth County, and a retired legislator, and a member of the Legislative Retirement System, who receives a pension or benefits therefrom.

28. Petitioner-Plaintiff, Chancel Brown is a resident of Forsyth County, and a retired school principal, and a member of the Annuities for State Employees (Deferred Compensation Plan), who receives a pension or benefits therefrom.

29. Petitioner-Plaintiff, Frances H. Burwell is a resident of Stokes County, and a retired register of deeds, and a member of the Register of Deeds Supplemental

Pension Fund Act of 1987, who receives a pension or benefits therefrom.

30. Petitioner-Plaintiff, Larson H. Moore, is a resident of Catawba County, and a retired fireman, and a member of the Firemen's Supplemental Fund (Hickory), who receives a pension or benefits therefrom.

31. Petitioner-Plaintiff, John A. Carriker, Jr. is a resident of Mecklenburg County, and a retired fireman, and a member of the Charlotte Firefighters' Retirement System, who receives a pension or benefits therefrom.

32. Petitioner-Plaintiff, Edward G. Manning is a resident of Wake County, and a retired North Carolina State University professor, and a member of the Optional Retirement Program for State Institutions of Higher Education, who receives a pension or benefits therefrom.

33. Petitioner-Plaintiff, Kenneth A. Griffin is a resident of Mecklenburg County, and is Senior Resident Superior Court Judge of the General Court of Justice and a member of the Uniform Consolidated Judicial Retirement System.

34. Petitioners-Plaintiffs, and those similarly situated are present or past officers or employees of the State of North Carolina, or an agency, department, institution or instrumentality thereof, present or past officers or employees of a local government of North Carolina, or an agency, department, institution or instrumentality thereof, and members or former members of a State or local government retirement system authorized and administered pursuant to N.C. Gen. Stat. chap. 7A, chap. 58, chap. 120, chap. 128, chap. 135, chap. 143, or chap. 165, or any other statute, including but not limited to those persons whose benefits accrued and vested prior to or after 12 August 1989 or are former members of such a retirement system who retired and began to receive pensions, benefits, or monies prior to or after 12 August 1989.

35. All State and local government retirement plans voluntary or mandatory heretofore or hereinafter mentioned are referred to collectively herein as the "Plans".

36. Respondent-Defendant State of North Carolina is a sovereign state, a part of the United States of America and all matters herein complained of were and are being committed by virtue of the purported power and authority of said State by officials, agents and employees thereof under color of law.

37. Respondent-Defendant, North Carolina Department of Revenue is a Department and agency of the Respondent-Defendant State of North Carolina, charged with administration of state income tax and policies including the collection of individual personal income taxation.

38. Respondent-Defendant Helen A. Powers was Secretary of the North Carolina Department of Revenue and at all times material hereto up to and including the filing of this action was responsible for the administration of said Department regarding the collection of taxes on individual personal income. Respondent-Defendant Powers is sued in both her individual and official capacity.

39. Respondent-Defendant Betsy Justus is the present Secretary of Revenue of the State of North Carolina and is the proper named Defendant in an action of this kind to recover taxes paid to the Department of Revenue of the State of North Carolina. References herein to the Department of Revenue shall be deemed also to refer to Defendants Justus and Powers.

40. Respondent-Defendant, North Carolina Department of State Treasurer is a Department and agency of the Respondent-Defendant, State of North Carolina which has imposed upon it the duty and responsibility either singly or jointly, the duty and responsibility to administer certain of the Plans as hereinafter alleged and on information and belief, has custody of all tax monies collected by the State. Respondent-Defendant, Harlan E.

Boyles is the Chief Administrative Officer of said Department.

41. Respondent-Defendant, Harlan E. Boyles is the Treasurer of the State of North Carolina and upon information and belief has custody of tax monies collected by the State and is sued in both his individual and official capacity. As Treasurer this Respondent-Defendant has imposed upon him the duty and responsibility, either singly or jointly, the responsibility [sic] to administer certain of the plans as hereinafter alleged.

42. Respondent-Defendant, North Carolina Firemen's and Rescue Workers' Pension Fund was created and exists by virtue of N.C. Gen. Stat. chap. 58, article 86.

43. Respondent-Defendant, Legislative Retirement System was created and exists by virtue of N.C. Gen. Stat. chap. 120, article 1A and is administered by the Board of Trustees of the Retirement System for Teachers and State Employees and Respondent-Defendant, Harlan E. Boyles is the Chairman thereof.

44. Respondent-Defendant, National Guard Retirement System was created and exists by virtue of N.C. Gen. Stat. chap. 127, article 3.

45. Respondent-Defendant, Retirement System for Counties, Cities and Towns was created and exists by virtue of N.C. Gen. Stat. chap. 128, article 3.

46. Respondent-Defendant, Retirement System for Teachers and State Employees was created and exists by virtue of N.C. Gen. Stat. chap. 135, article 1.

47. Respondent-Defendant, Supplemental Retirement Income Act of 1984, commonly known as the 401-K Plan was created and exists by virtue of N.C. Gen. Stat. chap. 135, article 5, and is administered by Respondent-Defendant Department of Treasurer.

48. Respondent-Defendant, Separate Insurance Benefit Plans for State and Local Governmental Law Enforcement Officers was created and exists by virtue of N.C. Gen. Stat. chap. 143, article 12F. Respondent-Defendant Harlan E. Boyles is Chairman thereof.

49. Respondent-Defendant, Sheriff's Supplemental Pension Fund of 1985 was created and exists by virtue of N.C. Gen. Stat. chap. 143, article 12H.

50. Respondent-Defendant, Annuities for State Employees, commonly referred to as the Deferred Compensation Plan, was created and exists by virtue of N.C. Gen. Stat. chap. 147, article 2A.

51. Respondent-Defendant, Register of Deeds Supplemental Pension Fund Act of 1987 was created and exists by virtue of N.C. Gen Stat. chap. 161, article 3 and Respondent-Defendant Edward Renfrow is the Administrator thereof.

52. Respondent-Defendant, Uniform Consolidated Judicial Retirement System was created and exists by virtue of N.C. Gen. Stat. chap. 135, article 4.

52.1. Respondent-Defendant, Judicial Retirement System that was in effect prior to 1974 by virtue of N.C. Gen. Stat. chap. 7A, article 6 and article 8.

53. Respondent-Defendant, Public Employees Benefits Services of North Carolina was created and exists by virtue of N.C. Gen. Stat. chap. 143B, article 9.

54. Respondent-Defendant, Fireman's Supplemental Fund (Hickory) was created and exists by virtue of 1971 N.C. Sess. Laws ch. 65.

55. Respondent-Defendant, Charlotte Firefighters' Retirement System was created and exists by virtue of 1947 N.C. Sess. Laws ch. 926.

56. Respondent-Defendant, Optional Retirement Program for State Institutions of Higher Education was cre-

ated and exists by virtue of N.C. Gen. Stat. chap. 135, article 1.

57. Any other pension plan of the state of North Carolina, its agencies, departments, institutions or political subdivisions which said plans presently or heretofore provided or provide benefits to employees or their beneficiaries and which prior to 12 August 1989, were exempt from North Carolina state income taxation is hereinafter named as a Respondent-Defendant.

58. This action is properly maintainable as a class action pursuant to N.C. Gen. Stat. § 1A-1, Rule 23.

59. Petitioners-Plaintiffs bring this action on behalf of themselves and all other individuals similarly situated. The class which Petitioners-Plaintiffs propose to represent is composed of the following individuals:

A. All state and local government officials and employees (or beneficiaries, survivors, etc., of such officials and employees) who are members of or participated in any of the plans heretofore referred to, or any other plan, whose benefits vested prior to 12 August 1989 pursuant to said plan; and

B. All state and local government officials and employees (or beneficiaries, survivors, etc., of such officials and employees) who have heretofore retired or hereafter retire and qualify to receive benefits pursuant to any of said plans or any other plan.

60. The questions of law and fact herein are common to all members of the proposed class.

61. The claims of representative named Petitioners-Plaintiffs are typical of the claims of those unnamed members of the class which Petitioners-Plaintiffs propose to represent.

62. The common relief sought by the named Petitioners-Plaintiffs is effective and appropriate to the entire

class adjudication of common questions of law and proof of common questions of fact will be dispositive of the rights of each and every member of the class.

63. The named Petitioners-Plaintiffs will fairly and adequately protect the interests of the members of the class they propose to represent and their counsel is experienced in the prosecution of class actions and in litigation of constitutional and other claims.

64. Respondents-Defendants have acted and refused to act on grounds generally applicable to the entire class by engaging in a pattern, practice, policy and under color of law of unlawful and unconstitutional taxing of State or local government retirement pensions, benefits, or monies, all as hereinafter alleged.

65. A class action is far superior to other available methods for the fair and efficient adjudication of this controversy in that a class action can be easily managed and will permit the adjudication of numerous individual claims in one forum and will conserve the resources of all parties and Court. Many of the proposed class members may not be aware of their rights against the Respondents-Defendants and many are believed to be in a financial position which makes it difficult if not impossible for them to assert their rights. The desirability of concentrating the controversy in a single forum outweighs any interest of individual members of the proposed class in individually controlling the prosecution of his or her claims.

66. That prior to 12 August 1989 all benefits, pensions, and monies payable under any of the Plans were exempt from North Carolina income tax.

67. That prior to 12 August 1989 the State of North Carolina had assured all of Petitioners-Plaintiffs that any benefits to be received pursuant to said Plans would be exempt from North Carolina income tax and Peti-

tioners-Plaintiffs relied on said assurance as a part of their employment or service with any of Respondents-Defendants, their political subdivisions, agencies or instrumentalities thereof.

68. That on 12 August 1989 the North Carolina General Assembly enacted 1989 N.C. Sess. Law Ch. 792 (hereinafter "the" Act [sic]) a copy of which is attached hereto and made a part hereof as though fully set forth herein, which said act purportedly removed all income tax exemptions on pensions, benefits and monies payable under any of the said Plans thereby purportedly rendering any pensions, benefits, or monies payable subject to North Carolina income tax.

69. Subsequent to the 12 August 1989 Act, Defendant Powers and the Department of Revenue began to put in place mechanisms to collect 1989 income taxes from Plaintiff-Petitioners and members of the class which said taxes would allegedly become due and payable on 16 April 1990.

70. On 27 February 1990, Wake County Court Judge Howard E. Manning, Jr. entered an Ex Parte Order of Conditional Class Certification "for the sole purpose of giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds and required by N.C. Gen. Stat. Chap. 105."

71. On 28 February 1990, 26 March 1990, 16 April 1990 and 26 April 1990, Plaintiffs' counsel delivered to former Secretary Powers and the Department of Revenue Notices of a refund demand for taxes paid on retirement benefits on behalf of the above class in which counsel, on behalf of the class of state retirees and pursuant to N.C.G.S. § 105-267, and any other legal means, protested and demanded the "refund of all income taxes on any pension, benefits, or monies received from any present or former retirement system of the State of North Carolina heretofore paid for the tax year 1989 by any named or

unnamed class member." Counsel further stated that the individuals comprising the class were identifiable by the Department of Revenue and Department of State Treasurer.

72. In her response of 26 April 1990, Secretary Powers states that her Department is unauthorized to make refunds and that there was insufficient information in Plaintiffs' request for the Department to determine whether and in what amount a refund would be made, and as such, the letter of Plaintiffs' counsel did not constitute a valid demand for refund.

73. The 27 February 1990 Order of Judge Manning certifying the present action as a class action for the "sole purpose of giving any notice . . . that may be required to obtain tax refunds . . .," together with the written class demands for refunds of [sic] constitutes timely and sufficient demand for refunds under Chapter 105 of the North Carolina General Statutes and tolled any limitations period for all state pensioners who were entitled to a refund of taxes paid on pension benefits.

74. Consequently, Defendants' denial of the refund demand on the ground of insufficient information under G.S. § 105-267 is wrongful and is not authorized by any statute or valid regulation or policy of the state of North Carolina, and Petitioners-Plaintiffs are entitled to recover of Defendant such income taxes paid upon their state retirement benefits for tax years 1989.

75. As stated above, this cause of action is brought to recover monies rightfully belonging to the Petitioners-Plaintiffs, individually and for the benefit of others similarly situated, which have been unlawfully collected, or are being unlawfully collected by the Department of Revenue and paid into the State treasury in the form of income taxes, in excess of the amount legally due the State, as herein alleged.

76. Defendants Boyles and the Department of State Treasurer are also proper named Defendants for this claim for a refund of taxes paid into the State treasury.

77. Petitioners-Plaintiffs and all similarly situated past and present state employees have been required to pay taxes into the State treasury upon their state retirement benefits as a result of clerical error, misinterpretation of the law, or otherwise, as alleged above.

78. Defendant Boyles, through powers vested in him as Treasurer of the Department of State Treasurer is expressly authorized and required by statute to refund to Petitioner-Plaintiffs, and to all similarly situated past and present state employees whom they seek to represent, amounts of income taxes paid to the State in excess of the amounts legally due the State, pursuant to N.C. G.S. § 147-84.

79. Petitioners-Plaintiffs have, for themselves and for that class of persons they seek to represent, made written demands pursuant to N.C. G.S. § 147-84 upon Defendant Boyles for refund of all income taxes paid for the 1989 tax year by letter dated 16 April 1990.

80. In addition, certain named Plaintiffs and certain other class members made individual demands within 30 days of payment in which their social security numbers and other relevant information was given to the Secretary and the Department of Revenue. No response whatsoever has been forthcoming and more than 90 days has elapsed since the making of these demands.

81. Defendants have failed to respond to the demands made by individual Plaintiffs and individual class members for refund of excess payments collected and paid into the State treasury.

82. Defendants' failure to respond to the demand for refund is wrongful and Plaintiffs are entitled to recover from Defendants such excess income taxes paid for the 1989 tax year and any subsequent tax year.

FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT)

83. Petitioners-Plaintiffs reallege allegations 1-82 as though fully set forth herein.

84. That the act and actions heretofore complained of constitute a breach of contract between Petitioners-Plaintiffs and Respondents-Defendants, their political subdivisions or agencies or instrumentalities thereof.

SECOND CLAIM FOR RELIEF
(FEDERAL CONSTITUTIONAL CLAIMS)

85. Petitioners-Plaintiffs reallege allegations 1-84 as though fully set forth herein.

86. That the act and actions heretofore complained of were and are committed under color of law in violation of the fifth and fourteenth amendments to the United States Constitution for the reason that said act and actions amount to a taking of property without just compensation, are arbitrary and capricious, violate due process and equal protection, and were and are committed in violation of article 1, section 10, of the United States Constitution in that they impair obligations of contract, all as protected by 42 U.S.C. § 1983.

THIRD CLAIM FOR RELIEF
(STATE CONSTITUTIONAL CLAIMS)

87. Petitioners-Plaintiffs reallege allegations 1-86 as though fully set forth herein.

88. That the Act and actions herein complained of are invalid, void, and unconstitutional in that they violate:

a. N.C. Const. art. 1, Sec. 16 in taxing acts previously done.

b. N.C. Const. art. 1, Sec. 19 for the reason that they amount to a taking of property without just

compensation, are arbitrary and capricious, are in violation of due process and equal protection and impair obligations of contract.

c. N.C. Const. art. 4, Sec. 21 as to members or former members of the Judicial Branch of Government in that they diminish the salary of said judicial officials during their continuance in office.

d. N.C. Const. art. 5, Sec. 5 in that the Act levying the tax does not state the special object to which said tax is to be applied.

e. N.C. Const. art. 5, Sec. 6 in that the Act authorizes the use of retirement funds for purposes other than retirement benefits and purposes.

FOURTH CLAIM FOR RELIEF
(DECLARATORY AND INJUNCTIVE RELIEF)

89. Petitioners-Plaintiffs reallege allegations 1-88 as though fully set forth herein.

90. That the Act and actions heretofore complained of entitle Petitioners-Plaintiffs to a Declaratory Judgment, that the same are void, invalid, and unenforceable, all as hereinbefore alleged.

FIFTH CLAIM FOR RELIEF
(CLAIMS OF PAST AND PRESENT STATE EMPLOYEES FOR RETURN OF ANY AND ALL MONIES HERETOFORE OR HEREAFTER ILLEGALLY COLLECTED AND WITHHELD AS INCOME TAX ON THE PENSIONS, BENEFITS, OR MONIES PAID BY SAID PLANS)

91. The allegations of paragraphs 1-90 are incorporated and realleged herein by reference.

92. This action is brought to recover monies rightfully belonging to the Petitioners-Plaintiffs and the class

they seek to represent, unlawfully collected and being unlawfully collected by the Defendants in the form of income taxes as herein alleged, and the Court has jurisdiction to determine this matter *de novo* under N.C.G.S. §§ 105-266, 105-266.1, 105-267, 105-267.1, 147-84 and any other statute whether specifically alleged herein or not, and all conditions precedent to such jurisdiction and to the power and duty of this Court to order the refund of such taxes have been performed.

93. Petitioners-Plaintiffs instituted the present class action, challenging Defendants' present taxation of their state retirement income, benefits, pensions and monies payable under any of the above Plans where, prior to legislation enacted 12 August 1989, the same had been entirely exempt from state income tax. The current taxation scheme constitutes, in essence, breach of contract, impairment of contract and constitutes violations of both the federal and state constitutions as stated above.

WHEREFORE, the Petitioners-Plaintiffs pray on their own behalf and on behalf of those similarly situated as follows:

1. For immediate conditional certification as a class pursuant to N.C. Gen. Stat. § 1A-1, Rule 23 for the limited purpose of making any demands on the Respondents-Defendants as may be necessary to secure a refund of any income taxes heretofore or hereafter paid on any pensions, benefits, or monies received from any of the said Plans.

2. For certification as a class pursuant to N.C. Gen. Stat. § 1A-1, Rule 23.

3. A Declaratory Judgment pursuant to N.C. Gen. Stat. § 1-253 *et seq* that the act *and the* actions of Respondents-Defendants are void, invalid, and no force and effect as heretofore alleged.

4. A Declaration that the act and the actions of Respondents-Defendants are unconstitutional in violation of

the United States Constitution as protected by 42 U.S.C. § 1983 al. .s heretofore alleged.

5. A Declaration that the Act and actions of Respondent-Defendant violate the North Carolina Constitution as heretofore alleged.

6. A permanent injunction prohibiting Respondents-Defendants or anyone acting by, through, under or in concert therewith from enforcing said act and collecting income tax on any benefits, pensions, or monies paid by said Plans.

7. A return of any and all monies heretofore or hereafter illegally collected and withheld as income tax on the pensions, benefits or monies paid by said Plans.

8. For attorney's fees as provided by 42 U.S.C. § 1983 and § 1988.

9. For such other and further relief as may be justified.

10. That the cost of this action be taxed to Respondents-Defendants.

This the 10th day of September, 1990.

WOMBLE CARLYLE SANDRIDGE & RICE

/s/ G. Eugene Boyce
G. EUGENE BOYCE—NCSB: 435
DONALD L. SMITH—NCSB: 4043
WALLACE R. YOUNG, JR.—NCSB: 13160

Post Office Box 831
Raleigh, North Carolina 27602
(919) 755-2100

CHARLES H. TAYLOR
Attorney at Law

/s/ Charles H. Taylor (by G.B.)
CHARLES H. TAYLOR

4295 Shattlon Drive
Winston-Salem, North Carolina 27106
(919) 924-6064

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF WAKE

Donald L. Smith, being first duly sworn, does depose and say that he is the Attorney of Record in the above-entitled action; that he has read the foregoing Petition and Complaint, knows the contents thereof except as those matters and things except as to information and belief, and as to those matters he believes them to be true.

This the 10th day of September, 1990.

/s/ Donald L. Smith (SEAL)
DONALD L. SMITH

Sworn to and subscribed before me
this the 10th day of September, 1990.

/s/ Sheila M. Mathews
Notary Public

My Commission Expires: March 30, 1994

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing SECOND AMENDED AND SUPPLEMENTAL PETITION AND COMPLAINT in the above-captioned action upon all other parties to this cause by and depositing a copy hereof in a postpaid wrapper in a post office of official depository under the exclusive care and custody of the United States Post Office, addressed as follows:

Norma S. Harrell
George W. Boylan
Douglas A. Johnston
Assistant Attorney Generals
Room 372, Revenue Building
Post Office Box 629
Raleigh, North Carolina 27602-0629

This is to certify that the undersigned has this date served the foregoing SECOND AMENDED AND SUPPLEMENTAL PETITION AND COMPLAINT in the above-capitioned action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United States Postal Service, Certified Mail, Return Receipt Requested, all as required by Rule 4(j) of the North Carolina Rules of Civil Procedure, addressed as follows:

Larson H. Moore
Chairman, Board of Trustees
c/o Local Fireman's Relief Fund
652 7th Avenue Place S.E.
Hickory, North Carolina 28601

Dennis R. Greene
Chairman, Board of Trustees
c/o Charlotte Firtfighters Retirement System
428 E. 4th Steet, Suite 205
Charlotte, North Carolina 28202

This the 13th day of September, 1990

WOMBLE CARLYLE SANDRIDGE
& RICE

By: /s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.
Attorney for Plaintiffs

APPENDIX E

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE

90-CVS-02266

JAMES H. POU BAILEY, *et als.*,
Petitioners-Plaintiffs,

v.

STATE OF NORTH CAROLINA, *et als.*,
Respondents-Defendants.

ANSWER

[Filed Oct. 16, 1990]

NOW COME the Defendants-Respondents in the above-captioned matter, except the Hickory Firemen's Supplemental Retirement Fund, the Charlotte Firemen's Retirement System, and any unspecified and unidentified pension, retirement, or other plans, answering the Second Amended Supplemental Petition and Complaint filed herein. The Defendants-Respondents filing this answer, hereinafter referred to as "the State Defendants," allege and say that:

FIRST DEFENSE

1. The allegations of Paragraph 1 are admitted except that Petitioner-Plaintiff James H. Pou Bailey ceased being a member of the Uniform Consolidated Judicial Retirement System upon his retirement.

2. As to the allegations of Paragraph 2, it is admitted that Petitioner-Plaintiff A. Pilston Godwin is a resident of Wake County and a retired Regular Judge of the Superior Court and that he was covered by the judicial retirement provisions in effect prior to 1974. As to the further allegations of Paragraph 2, it is denied that Petitioner-Plaintiff A. Pilston Godwin receives a pension or benefits from any judicial retirement system or plan in effect prior to 1974 since he retired from the Uniform Judicial Retirement System and now receives a benefit from the Consolidated Judicial Retirement System, which is a successor plan to the Uniform Judicial Retirement System. Any remaining allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are admitted except that Petitioner-Plaintiff Harry L. Underwood ceased being a member of the Teachers' and State Employees' Retirement System of North Carolina, the proper name for the "Retirement System for Teachers and State Employees" referred to in the Petition and Complaint, upon his retirement. Said retirement system will be referred to hereafter as the "Teachers' and State Employees' Retirement System."

4. As to the allegations of Paragraph 4, it is admitted that Petitioner-Plaintiff Melvin T. Munn is a resident of Wake County and a retired deputy sheriff. It is further admitted that Petitioner-Plaintiff Melvin T. Munn is a participant, not a member, of the Separate Insurance Benefits Plan, the proper name for the "Separate Insurance Benefits Plans for State and Local Governmental Law Enforcement Officers" referred to in the Petition and Complaint. Said Plan will be referred to hereafter as the "Separate Insurance Benefits Plan." The Separate Insurance Benefits Plan provides certain life insurance and sickness and accident disability benefits through a contract with a commercial insurance carrier, to which all claims are submitted directly. The State defendants are

without sufficient knowledge and information to form a belief as to the truth of the allegations that Petitioner-Plaintiff Melvin T. Munn is receiving any benefits from the Separate Insurance Benefits Plan, and the same are therefore denied. Any remaining allegations of Paragraph 4 are admitted.

5. The allegations of Paragraph 5 are admitted except that Petitioner-Plaintiff is a participant, not a member, in the Separate Insurance Benefits Plan.

6. The allegations of Paragraph 6 are admitted except that Petitioner-Plaintiff James H. Kleu ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

7. The allegations of Paragraph 7 are admitted except that Petitioner-Plaintiff Joseph Gilmer Binkley ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

8. The allegations of Paragraph 8 are admitted except that Petitioner-Plaintiff Eula G. Bullard ceased being a member of the Teachers' and State Employees' Retirement System upon her retirement.

9. The allegations of Paragraph 9 are admitted except that Petitioner-Plaintiff Mildred C. Seawell ceased being a member of the Teachers' and State Employees' Retirement System upon her retirement.

10. The allegations of Paragraph 10 are admitted except that Petitioner-Plaintiff Emily B. Jones ceased being a member of the Teachers' and State Employees' Retirement System upon her retirement.

11. The allegations of Paragraph 11 are admitted except that Petitioner-Plaintiff Samuel T. Arrington ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

12. The allegations of Paragraph 12 are admitted except that Petitioner-Plaintiff John W. Cartwright ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

13. The allegations of Paragraph 13 are admitted except that Petitioner-Plaintiff David L. Britt ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

14. The allegations of Paragraph 14 are admitted except that Petitioner-Plaintiff Mattie E. Lassiter ceased being a member of the Teachers' and State Employees' Retirement System upon her retirement.

15. The allegations of Paragraph 15 are admitted except that Petitioner-Plaintiff Paul Lee Salisbury, Jr., ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

16. The allegations of Paragraph 16 are admitted except that Petitioner-Plaintiff Charles S. Manooch, Jr., ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

17. The allegations of Paragraph 17 are admitted except that Petitioner-Plaintiff Roy E. Thompson ceased being a member of the Teachers' and State Employees' Retirement System upon his retirement.

18. As to the allegations of Paragraph 18, it is denied that Petitioner-Plaintiff Clyde R. Shook is a member of the Teachers' and State Employees' Retirement System and the National Guard Retirement System. It is however, admitted that Petitioner-Plaintiff Clyde R. Shook is a former member of the Teachers' and State Employees' Retirement System who receives benefits therefrom and that he receives a pension or retirement pay from the North Carolina National Guard Pension Fund. The remaining allegations of Paragraph 18 are admitted.

19. The allegations of Paragraph 19 are admitted except that Petitioner-Plaintiff John H. Allen ceased being a member of the North Carolina Local Government Employees' Retirement System, the proper name for the "Retirement Systems for Counties, Cities, and Towns" referred to in the Petition and Complaint, upon his retirement. Said retirement system will be referred to hereafter as the "Local Government Employees' Retirement System."

20. As to the allegations of Paragraph 20, it is denied that Petitioner-Plaintiff Jesse M. Almon is a member of the Local Governmental Employees' Retirement System since he ceased being a member upon his retirement from that system. It is further denied that he is receiving any pension or benefits from the Supplemental Retirement Income Plan of North Carolina, the proper name for the plan referred to in the Petition and Complaint as the "Supplemental Retirement Income Act of 1984." Said plan will be referred to hereafter as the "Supplemental Retirement Income Plan." Any remaining allegations of Paragraph 20 are admitted.

21. As to the allegations of Paragraph 21, it is admitted that Petitioner-Plaintiff Edwin C. Guy is a retired law enforcement officer and, on information and belief, that he is a resident of Wake County. It is further admitted that he is a participant, not a member, in the Separate Insurance Benefits Plan. Defendants are without sufficient knowledge and information to form a belief as to the truth of the allegation that he receives benefits therefrom, and the same is therefore denied. Any remaining allegations of Paragraph 21 are admitted.

22. As to the allegations of Paragraph 22, it is admitted that Petitioner-Plaintiff George H. Smith is a retired law enforcement officer and, on information and belief, that he is a resident of Cabarrus County. It is further admitted that he is a participant, not a member,

in the Separate Insurance Benefits Plan. Defendants are without sufficient knowledge and information to form a belief as to the truth of the allegation that he receives benefits therefrom, and the same is therefore denied. Any remaining allegations of Paragraph 22 are admitted.

23. As to the allegations of Paragraph 23, it is denied that Petitioner-Plaintiff Ernest P. Cain is retired and receiving benefits from the Teachers' and State Employees' Retirement System, the Supplemental Retirement Income Plan, or the North Carolina Public Employee Deferred Compensation Plan, which is administered by the Public Employees Benefits Services Corp. It is admitted that Petitioner-Plaintiff Ernest P. Cain is a resident of Guilford County and is a member of the Teachers' and State Employees' Retirement System and a participant in the Supplemental Retirement Income Plan, and the North Carolina Public Employee Deferred Compensation Plan, Plan." Any remaining allegations of Paragraph 23 are denied.

24. As to allegations of Paragraph 24, it is denied that Petitioner-Plaintiff Thomas Dale Johnson is a member of the Sheriff's Supplemental Pension Fund, the proper name for the Plan referred to in the Petition and Complaint as the "Sheriff's Supplemental Pension Fund of 1985." Said Plan will be referred to hereafter as the "Sheriff's Supplemental Pension Fund." It is admitted that Petitioner-Plaintiff Thomas Dale Johnson receives a pension from the Sheriff's Supplemental Pension Fund. The remaining allegations of Paragraph 24 are admitted.

25. As to the allegations of Paragraph 25, it is admitted that Petitioner-Plaintiff Billy A. Baker is a participant in, and receiving benefits from, the Deferred Compensation Plan, which is administered by the Public Employees Benefits Service Corp. It is further admitted that he is a resident of Forsyth County and a retired state employee receiving benefits from the Teachers' and

State Employees' Retirement System. It is denied that he is a member of the Teachers' and State Employees' Retirement System since he ceased being a member upon his retirement. It is admitted that he is a participant, not a member, in the Supplemental Retirement Income Plan and receiving benefits therefrom. Any remaining allegations of Paragraph 25 are denied.

26. The allegations of Paragraph 26 are admitted.

27. As to the allegations of Paragraph 27, it is denied that Petitioner-Plaintiff Ned R. Smith is receiving a pension or benefits from the Legislative Retirement System. The remaining allegations of Paragraph 27 are admitted.

28. As to the allegations of Paragraph 28, it is denied that Petitioner-Plaintiff Chancel Brown is a member or participant in the Deferred Compensation Plan. The remaining allegations are admitted on information and belief.

29. The allegations of Paragraph 29 are admitted except that Petitioner-Plaintiff Frances H. Burwell is not a member of the Register of Deeds' Supplemental Pension Fund, which is the proper name for the Fund referred to in the Petition and Complaint as the "Register of Deeds Supplemental Pension Fund Act of 1987," but is eligible for and receives a pension therefrom. Said Fund will be referred to hereafter as the Register of Deeds' Supplemental Pension Fund. The remaining allegations of Paragraph 29 are admitted.

30. The State defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 30, and the same are therefore denied.

31. The State defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 31, and the same are therefore denied.

32. As to the allegations of Paragraph 32, it is denied that Petitioner-Plaintiff is either a member of or receives a pension or benefits from the Optional Retirement Program authorized under G.S. § 135-5.1, referred to in the Petition and Complaint as the "Optional Retirement Program for State Institutions of Higher Education." The remaining allegations of Paragraph 32 are admitted.

33. The allegations of Paragraph 33 are admitted.

34. As to the allegations of Paragraph 34, it is denied that the defendant Plans are all "retirement systems"; it is further denied that many of the plaintiffs are either "members" or "former members," rather than participants, beneficiaries or persons with other status as to the various pension, retirement, annuity, deferred compensation and benefit plans in question. The remaining allegations of Paragraph 34 are admitted.

35. As to the allegations of Paragraph 35, it is denied that the defendant Plans are all properly referred to as "retirement plans" since some are pension plans, some are deferred compensation or annuity plans, and some are insurance or other types of benefit plans. Otherwise, the allegations of Paragraph 35 are admitted.

36. The allegations of Paragraph 36 are admitted.

37. The allegations of Paragraph 37 are admitted.

38. The allegations of Paragraph 38 are admitted.

39. The allegations of Paragraph 39 are admitted.

40. The allegations of Paragraph 40 are admitted.

41. Answering the allegations of Paragraph 41, it is admitted that defendant Boyles has some responsibility for administering certain of the Plans either as chairman of a Board of Trustees or as head of the Department of State Treasurer, when either the appropriate Board of Trustees or the Department of State Treasurer or both

are charged with administering such Plans. The remaining allegations of Pargraph 41 are admitted.

42. The allegations of Paragraph 42 are admitted.

43. The allegations of Paragraph 43 are admitted.

44. The allegations of Paragraph 44 are admitted.

45. As to the allegations of Paragraph 45, it is admitted that the North Carolina Local Government Employees' Retirement System was created and exists by virtue of N. C. Gen. Stat. Chap. 128, Article 3, which is captioned "Retirement System for Counties, Cities and Towns". Said retirement system is otherwise referred to in this answer as the "Local Governmental Employees' Retirement System." Any remaining allegations of Paragraph 45 are admitted.

46. As to the allegations of Paragraph 46, it is admitted that the Teachers' and State Employees' Retirement System of North Carolina was created and exists by virtue of N.C. Gen. Stat. Chap. 135, Article 1, which is captioned, "Retirement System for Teachers and State Employees." Said retirement system is otherwise referred to in this answer as the "Teachers' and State Employees' Retirement System." Any remaining allegations of Paragraph 46 are admitted.

47. As to the allegations of Paragraph 47, it is admitted that the Supplemental Retirement Income Plan of North Carolina, commonly known as the 401(k) Plan, was created and exists by virtue of N. C. Gen Stat. Chap. 135, Article 5, which is captioned the "Supplemental Retirement Income Act of 1984". It is further admitted that the Supplemental Retirement Income Plan is administered jointly by the Department of State Treasurer and the Boards of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System. Further, Branch Banking & Trust Company also administers the Plan as agent and/or

contractor. Any remaining allegations of Paragraph 47 are admitted.

48. As to the allegations of Paragraph 48, it is admitted that the Separate Insurance Benefits Plan was created and exists by virtue of N. C. Gen. Stat. Chap. 143, Article 12F, which is captioned "Separate Insurance Benefits Plan for State and Local Governmental Law-Enforcement Officers." It is further admitted that defendant Harlan E. Boyles is the Chairman of the Boards of Trustees of the Teachers' and State Employees' Retirement System, which Boards jointly administer the Plan. Any remaining allegations of Paragraph 48 are admitted.

49. As to the allegations of Paragraph 49, it is admitted that the Sheriffs' Supplemental Pension Fund was created and exists by virtue of N. C. Gen. Stat. Chap. 143, Article 12H, which is captioned "Sheriffs' Supplemental Pension Fund Act of 1985." Any remaining allegations of Paragraph 49 are admitted.

50. As to the allegations of Paragraph 50, it is admitted that the North Carolina Public Employee Deferred Compensation Plan was created and exists by virtue of N. C. Gen. Stat. Chap. 147, Article 2A, which is captioned, "Annuities for State Employees." Any remaining allegations of Paragraph 50 are admitted.

51. As to the allegations of Paragraph 51, it is admitted that the Register of Deeds' Supplemental Pension Fund was created and exists by virtue of N.C. Gen. Stat. Chap. 161, Article 3, which is captioned the "Register of Deeds' Supplemental Pension Fund Act of 1987." It is denied that Edward Renfrow is a Respondent-Defendant or is the Administrator of the Register of Deeds' Supplemental Pension Fund. Any remaining allegations of Paragraph 51 are admitted.

52. As to the allegations of Paragraph 52, it is admitted that the Consolidated Judicial Retirement System

of North Carolina was created and exists by virtue of N. C. Gen. Stat. Chap. 135, Article 4.

52.1. Answering Paragraph 52.1, it is admitted that Articles 6 and 8 of Chapter 7A of the General Statutes provided for retirement compensation for retired appellate justices and judges and retired superior court judges prior to the establishment of the Uniform Judicial Retirement System, the predecessor system to the Consolidated Judicial Retirement System. The State defendants are unable to determine exactly what Petitioners-Plaintiffs are alleging in this paragraph, and remaining allegations of Paragraph 52.1 are therefore denied.

53. As to the allegations of Paragraph 53, the Public Employees Benefits Services Corp. is the third-party administrator for the Deferred Compensation Plan and was contracted with by the Board of Trustees of the Deferred Compensation Plan pursuant to N.C. Gen. Stat. Chap. 143B, Article 9. Any remaining or contrary allegations of Paragraph 53 are denied.

54. As to the allegations of Paragraph 54 it is admitted that Chapter 65 of the North Carolina Session Laws of 1971 is an act directing the Board of Trustees of the Local Firemen's Relief Fund of the City of Hickory to create and maintain the Hickory Firemen's Supplemental Retirement Fund and further providing for the administration and benefits for that Fund. Any contrary allegations of Paragraph 54 are denied.

55. As to the allegations of Paragraph 55, it is admitted that Chapter 926 of the North Carolina Session Laws of 1947 is an act authorizing and providing for the creation of the Charlotte Firemen's Retirement System and further providing for the administration and benefits for the System. Any contrary allegations of Paragraph 55 are denied.

56. The allegations of Paragraph 56 are admitted except that the proper name for the "Optional Retirement

Program for State Institutions of Higher Education," as it is referred to in the Petition and Complaint, is the "Optional Retirement Program."

57. As to the allegations of Paragraph 57, it is admitted that the Petition and Complaint attempts to name as a Respondent-Defendant any other, unnamed, "pension plan" which falls within the description in Paragraph 57. Any remaining allegations of Paragraph 57 are denied.

58. The allegations of Paragraph 58 are denied, and it is further denied that a class action may be brought against the Secretary of Revenue in either her official or individual capacity.

59. The State Defendants deny the allegations contained in paragraph 59 upon the grounds that they lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations. The Secretary of Revenue further denies the allegations of Paragraph 59 because she has not consented to be sued under the Declaratory Judgment Act, and also because the court lacks jurisdiction to entertain a class action against the Secretary of Revenue.

60. The allegations of Paragraph 60 are denied.

61. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in paragraph 61, and, therefore, deny same.

62. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in paragraph 62, and, therefore, deny same.

63. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in paragraph 63, and, therefore, deny same.

64. The allegations of Paragraph 64 are denied.

65. The allegations of Paragraph 65 are denied.

66. Answering paragraph 66, it is admitted that prior to the effective date of Chapter 792 of the 1989 Session Laws, all benefits and monies payable under any of the defendant Plans were exempt from North Carolina income tax.

67. The allegations of Paragraph 67 are denied.

68. Defendants admit that on 12 August 1989 the General Assembly enacted Chapter 792 of the Session Laws, whose provisions speak for themselves and require no answer.

69. The allegations of Paragraph 69 are admitted.

70. The allegations of Paragraph 70 are admitted.

71. The allegations of Paragraph 71 are admitted.

72. The allegations of Paragraph 72 are admitted.

73. The allegations of Paragraph 73 are denied.

74. The allegations of Paragraph 74 are denied.

75. The allegations of Paragraph 75 are denied.

76. The allegations of Paragraph 76 are admitted.

77. As to the allegations of Paragraph 77, it is admitted that some past and present state employees have been required to pay income taxes to the Department of Revenue upon some state retirement benefits, and that the funds of the Department of Revenue are paid to and held by the State Treasurer. The remaining allegations of Paragraph 77 are denied.

78. As to the allegations of Paragraph 78, it is admitted that Defendant Boyles has the authority under N.C.G.S. § 147-84 to refund taxes or other receipts which "are or have been by clerical error, misinterpretation of

the law, or otherwise, collected and paid into the State treasury in excess of the amount found legally due the State. . . ." It is specifically denied that Defendant Boyles could make any refund to Petitioners-Plaintiffs of any of the funds sought in this lawsuit absent statutory changes.

79. As to the allegations of Paragraph 79, it is admitted that Petitioners-Plaintiffs have made demands or claims in writing which they purported to make pursuant to N.C.G.S. § 147-84 for refund of all income taxes paid for the 1989 tax year by letter dated 16 April 1990.

80. Answering paragraph 80, it is admitted that some named plaintiffs and other unnamed purported class members within 30 days of payment made individual demands in writing upon the Secretary of Revenue for refunds of taxes in which social security numbers were contained. It is denied, however, that any named plaintiff, after such demand, waited at least 90 days before bringing this action. It is further denied that all plaintiffs have complied with the condition precedents required by G.S. § 105-267. Except as admitted herein, the allegations of Paragraph 80 are denied.

81. As to the allegations of Paragraph 81, the State Defendants have responded through the positions they have taken in this lawsuit to the demands made by individual Plaintiffs and individual class members for refunds of "excess payments collected and paid into the State treasury."

82. The allegations of Paragraph 82 are denied.

83. The responses in Paragraphs 1-82 are hereby incorporated by reference as though fully set forth herein.

84. The allegations of Paragraph 84 are denied, and it is specifically denied that there ever existed a contract between plaintiffs and defendants providing plaintiffs an exemption from income taxes.

85. The responses in Paragraphs 1-84 are hereby incorporated by reference as though fully set forth herein.

86. It is admitted that at all relevant times the State Defendants acted under color of State law. Except as expressly admitted herein, the allegations of Paragraph 86 are denied.

87. The responses in Paragraphs 1-86 are hereby incorporated by reference as though fully set forth herein.

88. The allegations of Paragraph 88 are denied.

89. The responses in Paragraphs 1-88 are hereby incorporated by reference as though fully set forth herein.

90. The State Defendants deny the allegations of Paragraph 90, and Defendant-Respondent Betsy Justus further denies that the court posseses jursidiction to enter a Declaratory Judgment against the Secretary of Revenue.

91. The responses in Paragraphs 1-90 are hereby incorporated by reference as though fully set forth herein.

92. Answering Paragraph 92, to the extent plaintiffs seek an interpretation of their rights as former members or beneficiaries of various retirement and pension plans, it is admitted that the court possesses jurisdiction over this action except to the extent that defenses such as sovereign immunity raise questions of subject matter jurisdiction. To the extent plaintiffs seek the recovery of monies in the form of income taxes pursuant to G.S. §§ 105-266, -266.1, -267, -267.1, and 147-84, it is denied that all conditions precedent required by such statutes have been satisfied, and it is further denied that the court possesses jurisdiction over this action.

93. As to the allegations of Paragraph 93, it is admitted that Petitioners-Plaintiffs instituted this action stating the reasons set out in this Paragraph. All remaining allegations of Paragraph 93 are denied.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted and should be dismissed.

THIRD DEFENSE

The complaint should be dismissed because the court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

Plaintiffs' claims against the State and its officials, agents or agencies constitute claims against the State of North Carolina which are absolutely barred by the doctrine of sovereign immunity, for which plaintiffs are entitled to no relief, including declaratory relief, injunctive relief, or damages.

FIFTH DEFENSE

Plaintiffs claims against defendants Harlan E. Boyles and Helen A. Powers in their individual capacities are barred by the doctrines of qualified immunity and the immunity of public officials under state law because all actions complained of were taken by defendants within the scope of their authority as officers of the State of North Carolina in the good faith belief that they were acting lawfully in the best interests of the State. Defendants' actions did not violate the clearly established statutory or constitutional rights of any person and were not taken corruptly or maliciously.

SIXTH DEFENSE

The State and its agencies are not "persons" subject to suit under 42 U.S.C. § 1983. Defendants Justus and Boyles are not persons subject to suit under 42 U.S.C. § 1983 when sued in their official capacities except if and when properly sued for prospective injunctive relief.

SEVENTH DEFENSE

Plaintiffs have failed to allege any personal actions or decisions by defendants Powers and Boyles and have therefore failed to state claims against them individually.

EIGHTH DEFENSE

Plaintiffs have failed to state allegations establishing a case or controversy and lack standing to raise claims on behalf of members of plans to which no plaintiffs belong as members or on behalf of former members of plans of which no plaintiffs are former members.

NINTH DEFENSE

To the extent plaintiffs assert a contractual right to exemption from imposition of State income taxes, it contravenes Art. 5, Sec. 2 of the Constitution of North Carolina, and is illegal, void and unenforceable.

TENTH DEFENSE

To the extent plaintiffs assert a statutory claim to exemption from imposition of State income taxes predicated upon statutes existing prior to January 1, 1989, such statutes are unconstitutional, null and void, and conferred upon plaintiffs no rights now enforceable by the court.

ELEVENTH DEFENSE

Plaintiffs' action constitutes a suit to prevent the collection of taxes, without having first paid same, and is barred by G.S. § 105-267.

TWELFTH DEFENSE

To the extent plaintiffs seek recovery of taxes paid on a date more than thirty days prior to the date on which a demand for their refund was made, their claims are barred by G.S. § 105-267, which is specifically pled by defendants as a defense to plaintiffs' action.

WHEREFORE, having fully answered the Second Amended and Supplemental Petition and Complaint filed herein, the State defendants pray the court that the relief sought by plaintiffs be denied, that this action be dismissed, that the State defendants recover their costs and attorneys' fees, and that the court award the State defendants such other and further relief as may appear reasonable and necessary in the premises.

This the 16th day of October, 1990.

LACY H. THORNBURG
Attorney General

/s/ George W. Boylan
GEORGE W. BOYLAN
State Bar No. 442

/s/ Norma S. Harrell
NORMA S. HARRELL
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101 N. Tryon St.
Charlotte, N.C. 28246
Additional Counsel for
Defendant Powers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served a copy of the foregoing Answer upon the persons indicated below by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following:

G. Eugene Boyce
Donald L. Smith
Wallace R. Young, Jr.
Womble Carlyle Sandridge & Rice
P. O. Box 831
Raleigh, N.C. 27602

Charles H. Taylor
429 Shattlon Drive
Winston-Salem, N.C. 27106

Attorneys for Petitioners-Plaintiffs

This the 16th day of October, 1990.

LACY H. THORNBURG
Attorney General

By: /s/ Norma S. Harrell
NORMA S. HARRELL
Special Deputy Attorney General
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APPENDIX F

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

February 28, 1990

Helen A. Powers (919) 755-2112
Secretary of the North Carolina
Department of Revenue
Revenue Building
2 South Salisbury Street
Raleigh, North Carolina 27602

Re: *James H. Pou Bailey, et al v. State of North Carolina, et al.*

Dear Secretary Powers:

In accordance with N.C. Gen. Stat. Chap. 105, specifically N.C. Gen. Stat. Chap. 105-267, and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr. on February 27, 1990, a copy of which was served on you by mail yesterday, we hereby demand a refund of all income taxes on any pension, benefits, or monies received from any present or former retirement system of the State of North Carolina heretofore paid for the tax year 1989 by any named or unnamed class member. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, its departments or agencies, specifically the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue.

This is to advise that a similar demand will be made each and every thirty (30) days hereafter for those tax-

payers who file and pay income tax during the interim period. Thus, I would request that the class members who pay income tax on the benefits, pensions or monies mentioned herein be identified as received by your department.

Sincerely,

/s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.

WRYjr/smm

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

March 26, 1990

(919) 755-2112

Helen A. Powers
Secretary of The North Carolina
Department of Revenue
Post Office Box 2000
Raleigh, North Carolina 27640

Re: *Refund on Taxes on Retirement Benefits*

Dear Secretary Powers:

In accordance with N.C. Gen. Stat. Chap. 105, specifically N.C. Gen. Stat. § 105-267 and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr. on 27 February 1990, a copy of which has heretofore been served on you, we hereby make a demand on behalf of all named or unnamed class members for a refund of all income taxes paid on any pension, benefits or monies received from any present or former retirement system, whether a voluntary or involuntary plan, of the State of North Carolina for the 1989 tax year. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, its departments and agencies including but not limited to the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue. This is to advise that a similar demand will be made each and every thirty days hereafter for those taxpayers who file and pay income tax on any pensions, benefits or monies received from any of the State or Local Government Retirement Plans or annuities.

I request that class members or potential class members who pay income tax on any of the pensions, benefits, or monies heretofore mentioned be identified as soon as possible but no later than receipt of the income tax returns received by your department.

Sincerely,

/s/ Donald L. Smith
DONALD L. SMITH

DLS/smm

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

April 16, 1990

(919) 755-2100

Ms. Helen A. Powers
Secretary of The North Carolina
Department of Revenue
Post Office Box 2000
Raleigh, North Carolina 27640

Re: *Refund on Taxes on Retirement Benefits*

Dear Secretary Powers:

In accordance with N.C. Gen. Stat. Chapter 105, including but not limited to N.C. Gen. Stat. § 105-267 or any other applicable statute of North Carolina and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr. on 27 February 1990, a copy of which has hertofore been served to you, we hereby make a demand on behalf of all named or unnamed class members for a refund of all income taxes paid on any person, benefits or monies received from any present or former retirement system, whether a voluntary or involuntary plan, of the State of North Carolina for the 1989 tax year. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, its departments and agencies including but not limited to the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue. This is to advise that a similar demand will be made each and every thirty days hereafter for those taxpayers who file and pay income tax on any pensions, benefits or monies received from any of the State or Local Government Retirement Plans or annuities.

I request that class members or potential class members who pay income tax on any of the pensions, benefits, or monies hertofore mentioned be identified as soon as possible but no later than receipt of the income tax returns received by your department.

Sincerely,

/s/ Donald L. Smith
DONALD L. SMITH

DLS/mmm
cc: George W. Boylan
Norma S. Harrell
Douglas A. Johnston

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

April 26, 1990

(919) 755-2100

Ms. Helen A. Powers
Secretary of The North Carolina
Department of Revenue
Post Office Box 2000
Raleigh, North Carolina 27640

Re: *Refund on Taxes on Retirement Benefits*

Dear Secretary Powers:

In accordance with N.C. Gen. Stat. Chapter 105, including but not limited to N.C. Gen. Stat. § 105-267 or any other applicable statute of North Carolina and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr. on 27 February 1990, a copy of which has heretofore been served to you, we hereby make a demand on behalf of all named or unamed class members for a refund of all income taxes paid on any pension, benefits or monies received from any present or former retirement system, whether a voluntary or involuntary plan, of the State of North Carolina for the 1989 tax year. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, it [sic] departments and agencies including but not limited to the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue. This is to advise that a similar demand will be made each and every thirty days hereafter for those taxpayers who file and pay income tax on any pensions, benefits or monies received from any of the State or Local Government Retirement Plans or annuities.

I request that class members or potential class members who pay income tax on any of the pensions, benefits, or monies heretofore mentioned be identified as soon as possible but no later than receipt of the income tax returns received by your department.

Sincerely,

/s/ Donald L. Smith
DONALD L. SMITH

DLS/smm
cc: George W. Boylan
Norma S. Harrell
Douglas A. Johnston

APPENDIX G

NORTH CAROLINA DEPARTMENT OF REVENUE
P.O. Box 25000
Raleigh, North Carolina 27640
James G. Martin, Governor Helen A. Powers, Secretary

April 26, 1990

Wallace R. Young, Jr.
Womble Carlyle Sandridge & Rice
Post Office Box 831
Raleigh, North Carolina 27602

Re: Bailey v. State; 90 CVS 2266

Dear Mr. Young:

I have your letter of February 28, 1990, which purports to be a demand for "a refund of all income taxes paid on any pension, benefits, or monies received from any present or former retirement system of the State of North Carolina heretofore paid for the tax year 1989 by any named or unnamed class member." Your letter recites that demand is made "[i]n accordance with N. C. Gen. Stat. Chap. 105, specifically N. C. Gen. Stat. Chap 105-267 and pursuant to an Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr."

Your letter does not state the grounds upon which your clients believe themselves entitled to a refund. I note, however, that your letter refers to *Bailey v. State*, a refund suit now pending in Wake County Superior Court, and that your complaint in that action seeks recovery on the theory that repeal of the statute affording an income tax exemption for state retirement benefits was contrary to a state constitutional provision concerning impairment of contract.

The Department of Revenue is authorized to make refunds of taxes alleged to have been paid pursuant to an unconstitutional statute only upon a proper demand by an identified taxpayer pursuant to G.S. 105-267. In order to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Deparement to determined whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of state retirement income received by the taxpayer during the year.

Your letter does not identify any individual taxpayer, nor does it furnish information sufficient to determine the amount of tax which any taxpayer paid with respect to state retirement income for the 1989 taxable year. Accordingly, your letter will not be considered a valid demand for refund, and no refunds will be issued.

Very truly yours,

/s/ Helen A. Powers
HELEN A. POWERS
Secretary of Revenue

HAP/wp

APPENDIX H

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

April 16, 1990

(919) 755-2100

HAND-DELIVERY

Mr. Harlan E. Boyles
Treasurer of the State of
North Carolina Department of Treasury
Albemarle Building
325 N. Salisbury Street
Raleigh, North Carolina 27611

Re: *Refund on Taxes on Retirement Benefits,* Bailey v. State, et al, *90 CVS 0226,* [sic] (*Wake County Superior Court*)

Dear Mr. Treasurer:

Pursuant to N.C. Gen. Stat. 147-84 or any other applicable statute of North Carolina, we hereby make a demand on behalf of all named or unnamed class members, as identified in the above-referenced class action previously served upon you, for a refund of all income taxes paid on any pension, benefits or monies received from any present or former retirement system, whether a voluntary or involuntary plan, of the State of North Carolina for the 1989 tax year. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, it [sic] departments and agencies including but not limited to the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue. This is to advise that a similar demand will be made

each and every thirty days hereafter for those taxpayers who file and pay income tax on any pensions, benefits or monies received from any of the State or Local Government Retirement Plans or annuities.

I request that class members, named or unnamed, who pay income tax on any of the pensions, benefits, or monies heretofore mentioned be identified as soon as possible but no later than receipt of the income tax returns.

Sincerely,

/s/ Donald L. Smith
DONALD L. SMITH

DLS/mmm

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * * *

April 26, 1990

(919) 755-2100

Mr. Harlan E. Boyles
Treasurer of the State of
North Carolina
Post Office Box 2000
Raleigh, North Carolina 27640

Re: *Refund on Taxes on State Retirement Benefits*

Dear Mr. Treasurer:

In accordance with N.C. Gen. Stat. § 147-84 or any other applicable statute of North Carolina and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Howard Manning, Jr. on 27 February 1990, a copy of which has heretofore been served to you, we hereby make a demand on behalf of all named or unnamed class members for a refund of all income taxes paid on any pension, benefits or monies received from any present or former retirement system, whether a voluntary or involuntary plan, of the State of North Carolina for the 1989 tax year. The individuals who comprise the class are readily and easily identifiable by and from the records of the State of North Carolina, it [sic] departments and agencies including but not limited to the records of the Department of State Treasurer, the various retirement systems and the Department of Revenue.

I request that class members or potential class members who pay income tax on any of the pensions, benefits, or

monies heretofore mentioned be identified as soon as possible.

Sincerely,

/s/ Donald L. Smith
DONALD L. SMITH

DLS/smm
cc: George W. Boylan
Norma S. Harrell
Douglas A. Johnston

APPENDIX I

LACY H. THORNBURG
Attorney General

STATE OF NORTH CAROLINA
Department of Justice
P.O. Box 629
Raleigh
27602-0629

June 11, 1990

Mr. G. Eugene Boyce
Mr. Donald L. Smith
Mr. Wallace R. Young, Jr.
Womble, Carlyle, Sandridge & Rice
Post Office Box 831
Raleigh, North Carolina 27602

RE: *Bailey v. State of North Carolina*, et al.,
No. 90 CVS 2127 [sic]

Dear Sirs:

In response to your request to the State Treasurer in this matter, regarding refunds under G. S. 147-84, please be advised that it is the position of the State Treasurer that the referenced statute does not by itself authorize any payments by the Treasurer.

The Treasurer may only pay money where there is a legislative appropriation or legislative authority to pay same. G. S. 147-84 simply sets forth the principle that whenever taxes have been by clerical error, misinterpretation of law, or otherwise, collected and paid into the state treasury in excess of the amount found legally due the state, the excess amount shall be refunded to the person entitled thereto. The determination of whether

amounts are legally due and the determination of persons entitled thereto are not within the authority of the State Treasurer to make.

If I can be of further assistance, please let me know.

Sincerely,

/s/ Douglas A. Johnston
DOUGLAS A. JOHNSTON
Assistant Attorney General

DAJ/cw
cc: Norma Harrell

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 89-282-CIV-5-H

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, and PAUL H. TURNEY,
Class B. Plaintiffs,

v.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE, and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Defendants.

ORDER

[Filed Aug. 16, 1990]

This matter is before the court on the defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons discussed below, the court grants the motion in part and denies it in part.

FACTS

The Class A Plaintiffs are retired federal employees who challenge former North Carolina income tax laws that treated the income of retired federal employees less favorably than the income of retired state employees. Federal retirement income was subject to a partial exemption, but state retirement income was exempted completely. This taxing scheme is indistinguishable from that struck down by the Supreme Court in *Davis v. Michigan Dep't of Treasury*, —— U.S. ——, 109 S. Ct. 1500, 108 L.Ed.2d 891 (1989), under 4 U.S.C. § 111 and the principle of intergovernmental tax immunity. The plaintiffs allege that the state's administration of its income tax laws deprive them of their civil rights in violation of 42 U.S.C. § 1983, 4 U.S.C. § 111, and the equal protection and due process clauses of the United States Constitution.

Class B plaintiffs are active-duty military personnel and reservists who challenge the statutory $1500 annual income tax exclusion for compensation paid to members of the North Carolina National Guard. Both classes seek damages in the form of refunds, a declaration that the collection of tax on such income violates federal law, and an injunction barring the defendants from collecting such taxes in the future.

The defendants have filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The parties have extensively briefed the issues, and the court has conducted a lengthy hearing. Accordingly, the motion is ripe for ruling.

DECISION

I. The Tax Injunction Act

The defendants contend that this action is barred by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This statute applies to requests for declaratory relief, injunctive relief, and damages. *See California v. Grace Brethren Church*, 457 U.S. 893, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982); *Moss v. Georgia*, 655 F.2d 668 (5th Cir. 1981). The plaintiffs invoke the federal instrumentalities exception to the Tax Injunction Act. Alternatively, the plaintiffs contend that the state remedy is not plain, speedy, and efficient.

Under the federal instrumentalities exception, the Tax Injunction Act does not bar actions in which the United States or one of its instrumentalities is the plaintiff. *See, e.g., Dep't of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L.Ed.2d 414 (1966). The parties have cited to the court no federal cases holding that employees are or are not instrumentalities. The plaintiffs rely on language in *Davis* tracing the development of the right of federal employees to invoke the doctrine of intergovernmental tax immunity. The plaintiffs argue that under *Davis* the definition of a federal instrumentality is coextensive with taxpayers protected by intergovernmental tax immunity and 4 U.S.C. § 111.

The court finds, however, that federal employees are not federal instrumentalities exempted from the Tax Injunction Act. *Davis*, which began in the Michigan state courts, does not address the applicability of the Tax Injunction Act. The Court did, as the plaintiffs suggest, outline the development of the taxation of the employees of one sovereign by another. In so doing, the Court stated that 4 U.S.C. § 111 codified *Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L.Ed. 927 (1939). It is clear from *Graves* that federal employees were exempt from state taxation not because they were federal instrumen-

talities, but because they were employees of instrumentalities. 306 U.S. at 483 n.2, 485. *See also New York v. Graves*, 299 U.S. 401, 408, 57 S. Ct. 269, 272, 81 L.Ed. 306 (1937).[1]

Because intergovernmental tax immunity cases draw a definitional distinction between instrumentalities and their employees, the court concludes that a similar distinction exists under the Tax Injunction Act. This conclusion is supported by the fact that all cases applying the instrumentalities exception involve entities that are clearly distinguishable from the individual plaintiffs in this action. *See, e.g., Dep't of Employment*, 385 U.S. at 359; *Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60 (1st Cir. 1974); *Federal Land Bank v. Bd. of County Comm'rs*, 582 F.Supp. 1507 (D.Colo. 1984); *First Nat'l Bank v. Dickinson*, 291 F.Supp. 855 (N.D.Fla. 1968), *affirmed*, 393 U.S. 409, 89 S. Ct. 685, 21 L.Ed.2d 634 (1969). Moreover, several identical actions brought in federal court by federal employees have been dismissed pursuant to the Tax Injunction Act. *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884, 107 S. Ct. 274, 93 L.Ed.2d 250 (1986); *Todd v. Johnson*, 718 F.Supp. 1305 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F.2d 877 (M.D.Ala. 1989).[2]

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[1] In *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982), the Court held that independent contractors are not federal instrumentalities protected by the doctrine of intergovernmental tax immunity. The Court drew a distinction between independent contractors and employees, whom the court described as "constituent parts" of the United States. *New Mexico*, 455 U.S. at 740, 102 S. Ct. at 1386. A possible interpretation of this case is that employees are instrumentalities. However, this case did not involve the Tax Injunction Act; rather, it seems to be consistent with the prior line of cases holding that federal employees are protected by intergovernmental tax immunity because they are employees of instrumentalities, not because they are themselves instrumentalities.

[2] None of these cases specifically addressed the federal instrumentalities exception.

Accordingly, the court finds that the plaintiffs are not federal instrumentalities exempted from the Tax Injunction Act.

The court finds, however, that the state remedy is not plain, speedy, and efficient. A plain, speedy, and efficient remedy is one that provides a taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981). The state remedy does not have to be equal to the federal remedy. *Ayers v. Polk County*, 697 F.2d 1375, 1377 (11th Cir. 1983). A state remedy is inadequate, however, if some "uncertainty" surrounds it. *Rosewell*, 450 U.S. at 516-17. The plaintiffs contend that the defendants have so confused the state remedy that it is impossible to enforce the plaintiffs' federal rights in state court.

The uncertainty surrounds the statute of limitations. The defendants contend that the plaintiffs' state remedy is governed by N.C. Gen. Stat. § 105-267, which provides that a taxpayer contesting the illegality of a tax must pay the tax and then file a written demand for refund within 30 days. If the refund is denied, the taxpayer has three years to file an action in the Superior Court of Wake County or the county of the taxpayer's residence. On its face, this remedy is plain, speedy, and efficient. *See Grace Brethren Church*, 457 U.S. at 412.

Confusion arises, however, out of the existence of N.C. Gen. Stat. § 266.1, which provides that taxpayers may file for refunds for mathematical or other errors within three years of payment. If no refund is given, the taxpayer has 90 days to file an action in the Superior Court of Wake County or the county of residence. The two statutes address different situations. Section 267 provides a remedy by which to contest illegal or unconstitutional taxes; section 266.1 provides a remedy by which to re-

ceive refunds for overpayment caused by mathematical or other errors. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

This remedy is uncertain because of the conduct of the individual defendants and the Department of Revenue. All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any* request for refund may be made within three years of payment. This information was provided in "Individual Tax Income Bulletins" published by the Department of Revenue. Plaintiffs' Memorandum, Exhibit 2. The defendants' instruction booklets are to the same effect. Moreover, after *Davis* was decided, the Department of Revenue announced publicly that refunds of taxes paid within three years would be allowed under the customary practice. Plaintiffs' Memorandum, Exhibits 33, 34. Taxpayers were not told of the 30-day rule until four days before the filing deadline for 1989, well after many of the plaintiffs had filed their returns.

The defendants, soon after the filing of 1989 tax returns, began denying *Davis* refund requests pursuant to the 30-day statute of limitations of section 267. They also raise this statute as a defense in related state court litigation and in this action. The defendants have thereby deprived the plaintiffs a full hearing and judicial determination of their claims. *Rosewell*, 450 U.S. at 513.

A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim.

The state remedy is also inadequate because it does not provide for a class action, thereby requiring individual

litigation of thousands of refund claims. Each of the claims is small enough to make the cost of such litigation prohibitive. The plaintiffs estimate that Class A contains 89,111 members and that Class B contains 49,486 members. (Exhibits 10, 11, and 12). At the hearing, plaintiffs' counsel estimated the average refund to be approximately $700. Some courts have held that the unavailability of class actions does not in itself render the state remedy inadequate. *See, e.g., Waldron*, 788 F.2d at 738. The court finds, however, that the absence of a class action procedure may be considered along with all other facts in determining whether the state remedy is adequate for purposes of the Tax Injunction Act.

The remedy provided by the state to the Class A Plaintiffs is the recently-enacted N.C. Gen. Stat. § 105-151.20. Pursuant to this statute, federal retirees who paid state income tax on federal retirement income for the taxable year 1988 may claim a tax credit in that amount in equal installments over a three-year period beginning with the taxable year 1990. This remedy is inadequate because it fails to take into account the time value of the plaintiff's money. The state is in essence admitting that the tax was improper, but some of the money will not be returned until five years after payment.[3] Furthermore, given that these plaintiffs are retirees, it is reasonable to assume that a certain number of them will die in the next three years and will never receive their money. Others may have no tax liability from 1990-1992 and so will be unable to use the credit. In reality, this remedy provides the class with only a partial refund.

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[3] The Court in *Rosewell* held that the state's failure to pay interest and the unavoidable delay in the litigation process did not prohibit the remedy from being speedy or efficient. 450 U.S. at 517-22, 101 S. Ct. at 1231-33. The defendants, however, are doing more than not paying interest; they are intentionally extending the period for refund through as late as April 15, 1993. This delay is not the unavoidable result of litigation, but is the intentional choice of the state legislature.

See Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299, 303, 72 S. Ct. 321, 324, 96 L.Ed.2d 335 (1952) (remedy is inadequate if only partial refund will be recovered).[4] This statute provides no remedy to the Class B plaintiffs.

For the above-stated reasons, the court finds that the state remedy is not plain, speedy, and efficient. *Hillsborough v. Cromwell*, 326 U.S. 620, 624-26, 66 S. Ct. 445, 90 L.Ed. 358 (1946). Therefore, this action is not barred by the Tax Injunction Act.

II. Comity

Since the court has found that the state remedy is not plain, speedy, and efficient for purposes of the Tax Injunction Act, it necessarily follows that the remedy is not plain, adequate, and complete for purposes of comity. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981). Therefore, comity does not bar the court from exercising jurisdiction over this action.

III. Eleventh Amendment

The plaintiffs' claims for monetary damages in the form of refunds are barred by the eleventh amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). The plaintiffs attempt to characterize their action as one for "equitable restitution." The Supreme Court has stated, however, that plaintiffs may not circumvent the eleventh amendment by characterizing a damages claim as one for equitable restitution.

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[4] Furthermore, this legislation, enacted after *Davis*, treats federal retirees differently than other taxpayers in that the retirees must receive their refunds over three years instead of in a lump sum payment. This legislation was enacted after the parties filed their briefs such that the parties have not addressed the issue of whether this remedy is an ongoing constitutional violation. *See* Footnote 5, *infra*.

Edelman, 94 S. Ct. at 1356. It has long been established that unconstitutional taxes may not be recovered from the state treasury. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed. 1121 (1944); *Smith v. Reeves*, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140 (1900).

The plaintiffs contend that federal courts may order relief that has some effect on the state treasury. For example, in *Milliken v. Bradley*, 433 U.S. 267, 289, 97 S. Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977), a federal court ordered a state to spend $5.8 million to upgrade its educational system. In *Papasan v. Allain*, 478 U.S. 265, 282, 106 S. Ct. 2932, 2942, 92 L.Ed.2d 209 (1986), the Court distinguished between the expenditure of state funds necessary for future compliance with a court order and awards for accrued monetary liability. A federal court may order the former type of relief, but not the latter. It is clear, however, that the plaintiffs are seeking an award for monetary liability, which is precisely what the eleventh amendment forbids.

The plaintiffs suggest as a possible remedy a tax credit applied to future tax years. Substantively, however, this remedy is still one for accrued monetary liability that would be satisfied out of the general revenues of the state. The plaintiffs cannot avoid the eleventh amendment by receiving their award in the form of future tax credits, rather than present cash payments.

The plaintiffs contend finally that the eleventh amendment does not bar their damages claims because they are federal instrumentalities. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S. Ct. 808, 814-15, 13 L.Ed.2d 717 (1965); *FDIC v. New York*, 732 F. Supp. 26 (S.D.N.Y. 1990). The court previously ruled, however, that federal employees are not federal instrumentalities. *Supra*, pp. 3-5. Therefore, the court must dis-

miss the damages claims against the defendants in their official capacities.[5]

IV. Powers' Qualified Immunity

The defendant Powers contends that she is protected from the damages claims by the doctrine of qualified immunity. Powers is shielded from liability if she can show that her conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396, 410 (1982). It must be objectively discernible in light of the law as it then existed that the defendant's conduct would violate that right. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 8034, 97 L.Ed.2d 523 (1987).

Powers contends that the *Davis* decision established a new rule of law. The court finds, however, that the doctrinal underpinnings of *Davis* are long-standing principles. Intergovernmental tax immunity has its genesis in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Similarly, 4 U.S.C. § 111, which plainly allows for only non-discriminatory taxation of federal employees, was enacted in 1939.

The substance of the defendant's argument is that she should not be required to forecast Supreme Court decisions at the risk of personal liability. In the court's opinion, however, *Davis* was inevitable. State officials should not be allowed to continue blatantly unconstitutional conduct until the courts specifically rule it unconstitutional. Powers had the statutory responsibility to

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[5] The eleventh amendment does not bar the damages claims against Powerse in her individual capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38, 94 S. Ct. 1683, 1687 (1974). Nor does it bar the claims for injunctive and declaratory relief necessary to correct an ongoing constitutional violation. *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L.Ed.2d 371 (1985).

regulate, monitor, advise, and act upon problems in administering the B state tax code. *See* N.C. Gen. Stat. §§ 143B-218, 143-219, 147-88, 105-257, and 105-453. Nevertheless, she collected unconstitutional taxes that she should have known were unconstitutional.

Soon after the enactment of 4 U.S.C. § 111, the North Carolina Attorney General reported in a February 12, 1940, Memorandum to the Commissioner of Revenue that section 111 "gives the consent of Congress to *non-discriminatory state taxation* of the compensation of Federal employees." Plaintiffs' Memorandum, Exhibit 14. The state instituted its discriminatory tax scheme in 1941; potential problems were first noted in a 1941 *North Carolina Law Review* article: "This may be permissible with respect to such state taxes as the income tax (unless it eventually face[s] trouble because of non-exemption for other annuities)." 19 N.C.L.Rev. 435, 519 (1941). Furthermore, on or about July 29, 1988, the defendant's office received a report from the Federation of Tax Administrators which included a two-page discussion of *Davis v. Michigan*. Finally, the discrepancy between federal and state retirement pay taxation was the subject of internal discussions throughout 1988 and 1989. Plaintiffs' Memorandum, Exhibits 18 (Letter from Department of Revenue to Legislative Counsel for the Governor) and 19 (Tax Fairness Commission Report of January 11, 1989).

Powers now asserts that it was unclear until *Davis* whether retired [sic] benefits were compensation for purposes of the Public Salary Tax Act. The *Davis* Court, however, found it obvious that retirement benefits were compensation. 109 S. Ct. at 1504. Moreover, it has been long-settled in North Carolina that retirement benefits are compensation. *See e.g. Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942). Indeed, the defendant received withholdings on federal retirement benefits pursuant to a state statute authorizing income taxes from

"wages" of federal employees. N.C. Gen. Stat. § 105-163.23. The court finds, therefore, that the defendant failed to recognize the legality of her conduct and that her conduct violated clearly established federal rights of which a reasonable person should have been aware.

CONCLUSION

Accordingly, for the reasons discussed above, it is hereby ORDERED that the defendants' motion to dismiss pursuant to the Tax Injunction Act and principles of comity is DENIED. The motion to dismiss pursuant to the eleventh amendment is GRANTED as to the claims for monetary relief against the state and DENIED as to all other claims. The motion of the defendant Powers to dismiss pursuant to the doctrine of qualified immunity is DENIED.

This the 15th day of August, 1990.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#22

APPENDIX K

LIST OF PARTIES TO THE PROCEEDING

Petitioners

James H. Pou Bailey
A. Pilston Godwin
Harry L. Underwood
Melvin T. Munn
Fred Benson
James H. Kleu
Joseph Gilmer Binkley
Eula G. Bullard
Emily B. Jones
Samuel T. Arrington
John W. Cartwright
David L. Britt
Mattie E. Lassiter
Paul Lee Salisbury, Jr.
Charles S. Manooch, Jr.
Roy E. Thompson
Clyde R. Shook
John H. Allen
Jesse M. Almon
Edwin C. Guy
George Smith
Ernest P. Cain
Thomas Dale Johnson
Billy A. Baker
Rosalie T. Adams
Victor Aldridge, Sr.
Clifton A. Anderson
Helen L. Andrews
Charles E. Arrington
Lillian B. Arrington
William K. Aubry, Jr.
W. Preston Barber, Jr.
Parker N. Bare
Margaret H. Barkley
Jackie D. Barrett
James B. Barrett
Arthur C. Beamon
Frank M. Bender
William D. Berg
June R. Jones
Robert P. Jones
Walter C. Joyce, Sr.
Odell M. Kearney
Ruth H. Kessler
John Kiger
Velma D. King
Frances S. Kiser
Jacob Koomen, Jr.
David T. Lambert
Walton S. Latta
Trudie J. Lawson
Clarence T. Leinbach, Jr.
Walter G. Leming
Virginia P. Lewis
Yates W. Lowe
James A. Lyerly
Harriette B. McCormick
L. James McDaniel
E. R. McKay
Harry B. McKee
W. S. McKinney
Doris W. McLamb
Joseph T. McMilliam
James F. Malcolm
Edward G. Manning
James H. March

Elza Van Marion
Mary H. Martin
Lester G. Masencup
Helen S. Mast
James B. Mast, Jr.
Melville L. Mauney
Robert A. Mayer
Virginia H. Mickey
Nona S. Miller
Ruth Minnick
Grover F. Minor
Charles B. Miracle
Thomas W. Berrier
Pauline J. Blackburn
Brenda W. Blanchfield
Robert L. Blevins
Elizabeth F. Bolich
Junious L. Bost
Ellie L. Boyles
Henry L. Bridges
Lawrence R. Bridges
Carey H. Broadwell
Chancel T. Brown
Joan W. Brown
Margaret M. Brown
John W. Buchan
Eunice W. Bullard
Dewey L. Butler
McCauley C. Byrum
Gertrude G. Cahoon
Joseph H. Calder
Catherine N. Cann
Dorothy T. Carmichael
Maucie O. Caton
Robert A. Caudle
Margaret H. Chapman
Odell Childress
Carl L. Clarke
Edward L. Clay, Sr.
Shari T. Cline
Selma C. Clodfelter
Harold D. Coley
Mataline Collette
Roberta M. Cook
Anna L. Cooper
Bertie R. Cooper
Carlyle C. Craven
N. Christel C. Crews
Donald E. Curtis
Violet H. Daniel
Mildred K. Davis
Howard Dickey
John B. Dillard
Esther P. Duncan
T. J. Duncan
Helen M. Dupree
Joseph E. Dupree
Jesse W. Edwards
Jack K. Moore
Lola T. Moretz
Leo G. Morgan
William F. Morgan
Brady W. Mullinax Sr.
John I. Nichols
Lucinda L. Nowlin
Donald S. Overcash
Dwight W. Padgett
Calvin C. Pearce
William W. Peek
George W. Peeler
Michael Pelech
Juanita B. Penn
Diane S. Peoples
Charles B. Pierce
Evelyn D. Pierce
Sylvia S. Pinyan

Mildred R. Poindexter
Winnie D. Potts
Levi Glen Powell
Thomas C. Pratt
Charles W. Rankin
Ralph L. Ray
Patsy M. Reynolds
Mattie B. Richard
Elna C. Rose
Frances T. Sacrinty
Edna G. Scales
Melvin J. Scales
Valda E. Schmitt
Worth G. Seats
Charles Selle
Nelson L. Shearouse
Conrad H. Shelton
Mary L. Shelton
Elizabeth H. Shermer
Blance S. Shipp
Ralph N. Shue
Francis C. Simmons
Joe L. Simmons
Harold E. Simpson
Richard H. Simpson
Reuben E. Slade
Garnet N. Smart
Lenora S. Smith
Charles B. Elks
Dan R. Emory
Charles F. English
Martin W. Ericson
James M. Eubanks, Jr.
Ruth U. Farthing
Nellie D. Fountain
J. Warren Franklin
Zenna H. Franklin
Emma Lee Furches
Alfred H. Garner
Evelyn C. Garrison
Fred W. Gentry
Catherine M. Gilbert
Meredith H. Gilbert
Ivey B. Gordon
Izoria S. Gordon
Louis N. Gosselin
Gladys P. Green
Consuella Greenwood
John L. Hairston
James A. Hammons
Samuel L. Harmon
Mary J. Hauser
Elmo F. Hicks
Idalia O. High
Carlee F. Hodge
Lucy Greene Hubbard
Hughes J. Hunt
Kay C. Hurt
Harold D. Isenberg
Ben M. Isenhour
Mary G. Isenhour
Mary P. H. Jackson
Lilliam K. Johnson
Virginia P. Johnson
Walter C. Johnson, Jr.
C. Myles Jones
Joe E. Jones
Lonnie H. Smith
Mattie S. Smith
Paul M. Smith
Frances J. Snow
Eulalia T. Solomon
G. Vance Solomon
Lucile J. Speas
David W. Sprivey
Charles A. Speed

Caroline G. Spencer
Thomas S. Thompson
Ella Belle Tillman
Doris E. Tucker
Justus M. Tucker
Ruth L. Tucker
Margaret M. Tugman
Frank L. Upright
Walter P. Upright
Elizabeth W. Wackerhagen
Martha M. Walker
Norman W. Walker
Ralph B. Walker
Elizabeth G. Walls
Jean A. Watson
Samuel S. Wheeler
Cora M. Whitehead
Daniel W. Williams
Eliza S. Williams
Harry Lee Williams
Elizabeth L. Wilson
Marian B. Wilson
Wilbur G. Wilson
Hoyt A. Wiseman
Virginia A. Wiseman
Ernest B. Wood, Sr.
Howard L. Wooters
Thomas S. Worsham
Jack D. Zimmerman
Kenneth A. Griffin

Respondents

State of North Carolina

The North Carolina Department of Revenue

Helen A. Powers individually

Betsy Justus, in her capacity as Secretary of the North Carolina Department of Revenue

The North Carolina Department of State Treasurer, Harlan E. Boyles Individually and in his capacity as Treasurer of the State of North Carolina

The North Carolina Firemen's and Rescue Worker's Pension Fund

Legislative Retirement System

National Guard Retirement System

Retirement Systems for Counties, Cities, and Towns

Retirement Systems for Teachers and State Employees

Supplemental Retirement Income Act of 1984

Separate Insurance Benefit Plans for State and Local Government Law Enforcement Officers

Sheriff's Supplemental Pension Fund of 1985

Annuities for State Employees

Register of Deeds Supplemental Pension Fund

Uniform Consolidated Judicial Retirement System

Public Employees Benefits Services of North Carolina

Fireman's Supplemental Fund (Hickory)

Charlotte Firefighters' Retirement System

Optional Retirement Program for State Institutions of Higher Education